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REPORTS
OF
CASES IN LAW AND EQUITY,
ARGUED AND DETERMINED IN THE
SUPREME COURT OF GEORGIA,
AT ATLANTA.

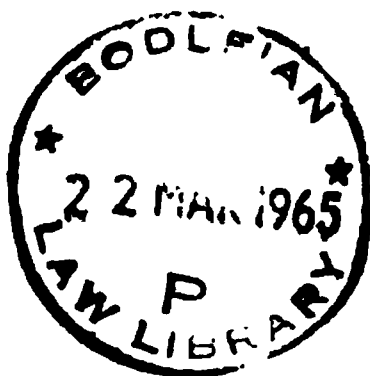
Parts of July Term, 1871, and January Term, 1872.

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CINCINNATI COLLEGE



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JUDGES AND OFFICERS

OF THE

SUPREME COURT OF GEORGIA,

DURING THE PERIOD OF THESE REPORTS.

HON. O. A. LOCHRANE, CHIEF JUSTICE.....*Atlanta.*
 *HON. HIRAM WARNER, CHIEF JUSTICE.....*Greenville.*
 HON. H. K. McCAY,.....*Americus.*
 *HON. W. W. MONTGOMERY,.....*Augusta.*

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 †Allapaha Circuit.....HON. J. W. O'NEAL,.....Valdosta.
 Atlanta CircuitHON. JOHN. L. HOPKINS,Atlanta.
 Augusta Circuit.....HON. WM. GIBSON,.....Augusta.
 Blue Ridge Circuit.....HON. NOEL B. KNIGHT,.....Marietta.
 Brunswick Circuit.....HON. W. M. SESSIONS,Blackshear.
 Chattahoochee Circuit,....HON. JAMES JOHNSON,.....Columbus.
 Cherokee Circuit.....HON. JOSIAH R. PARROTT,.....Cartersville.
 Eastern Circuit.....HON. WM. SCHLEY,.....Savannah.
 Flint Circuit.HON. JAMES W. GREEN,...Thomaston.
 Macon Circuit.....HON. CARLTON B. COLE,.....Macon.
 Middle Circuit.....HON. HANSFORD D. D. TWIGGS.....Louisville.
 Northern Circuit.....HON. GARNETT ANDREWS,.....Washington.
 Ocmulgee Circuit.....HON. PHILIP B. ROBENSON.....Greensboro.
 †Oconee Circuit.....HON. A. C. PATE.....Hawkinsville.
 Pataula Circuit.....HON. DAVID B. HARRELL,.....Preston.
 Rome Circuit... ..HON. ROBERT D. HARVEY,.....Rome.
 Southern Circuit.....HON. JNO. R. ALEXANDER,.....Thomasville.
 Southwestern Circuit.....HON. JAMES M. CLARK,.....Americus.
 Tallapoosa Circuit.....HON. WM. F. WRIGHT,.....Newnan.
 Western Circuit..HON. C. D. DAVIS,.....Monroe.

* WARNER was appointed Chief Justice January 19th, 1872, in lieu of LOCHRANE, C. J., resigned, and MONTGOMERY was appointed to fill WARNER's vacancy, on 4th of February, 1872.

† Allapaha Circuit was abolished and Oconee Circuit was made in December, 1871.

NOTE.

By Act of 1860 (Revised Code, section 4210) the decisions of the Supreme Court are required to be "announced by a written synopsis of the points decided." These decisions, thus announced from the bench, are, by the Judges, made the head-notes to the cases. Those head-notes followed by (R.,) are by the Reporter.

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NOTE—For meaning of "By two Judges," and the dates attached to certain head-notes, see note on page 567.

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of the State of Georgia,
AT ATLANTA,
JULY TERM, 1871.

PRESENT—O. A. LOCHRANE, CHIEF JUSTICE.
H. K. McCAY,
HIRAM WARNER, } JUDGES.

JAMES T. ELLIS *et al.*, plaintiffs in error, *vs.* G. B. LAMAR
et al., defendants in error.

Where A filed his bill in equity against B. and L., in which he alleged that B., as the agent of L., had sold to him certain guano, which was worthless, and fraud in the sale by the partner, and there was a demurrer to the bill for want of jurisdiction, on the ground that L., who was the owner of the guano, resided in a different county, and also for want of equity, and the Court sustained the demurrer:

Held, That the Court did not commit error in sustaining the demurrer under the facts in this bill, upon both the grounds. Equity will not entertain jurisdiction over the principal, by linking him with his agent or commission merchant, upon general allegations of fraud, or interest of commissions by such agent, out of the county of the residence of such principal.

Equity jurisdiction. Before Judge GREEN. Spalding Superior Court. February Term, 1871.

In their bill, filed in Spalding Superior Court, James T. Ellis, Richard H. Sims and Thomas G. Brooks, averred that in 1866 they bought of S. R. Brewer, of said county, as

Ellis et al. vs. Lamar et al.

agent of G. B. Lamar, of Chatham county, \$273 00 worth of a fertilizer represented by Brewer as Baker Island guano, for fertilizing their wheat lands, and paid Brewer that sum therefor; that Brewer represented it as good for such purpose, and thus induced the purchase, when he knew it was not; it proved to be utterly worthless; they lost what they paid for it, and \$50 00 in expense of testing its value by use; Brewer was interested in said sale to the extent of his commission, say \$20 00; Brewer has Lamar's assets sufficient to cover this loss and damage, and they do not know whether Lamar is solvent. They prayed that Brewer be enjoined from putting said assets out of his possession, and for a decree against Lamar for said loss and damage.

This bill was demurred to because there was no jurisdiction over Lamar in said county under said allegations, because the remedy at law was complete, and for want of equity. The demurrer was sustained and the bill was dismissed. That is assigned as error.

DOYAL & NUNNALLY, for plaintiff in error.

PEEPLER & STEWART, for defendant.

LOCHRANE, Chief Justice.

This was a demurrer filed to a bill brought against a commission merchant who sold guano for his principal, who lived in a different county in this State. The bill was filed in Spalding county, the residence of the commission merchant, and the Court sustained the demurrer, holding that the Court had not jurisdiction under the facts and law of the case.

We are of opinion the Court held properly. Equity will not entertain jurisdiction over a principal out of the county of his residence, by linking him with the party who acted as his commission merchant, upon general allegations of fraud and interest by commissions on sales of the property consigned, and we affirm the judgment.

Judgment affirmed.

Hollingsworth vs. Tanner.

JOSIAH HOLLINGSWORTH, plaintiff in error, vs. J. B. TANNER, defendant in error.

Where upon a bill filed to enjoin the execution of certain *fi. fas.* obtained against A as principal, and B as surety, upon the ground that the owner of the *fi. fas.* had made a contract with A, by which he owed him an amount equal to the judgment, and which he paid him to the wrong of his surety, by which the surety claimed to be discharged, and upon the hearing the holder of the *fi. fas.*, by his answer showed that he was the owner thereof, and that during the war he had employed the principal defendant to carry off his negroes out of the reach of the Federal army, and had paid him therefor at the time in old issue of Confederate money, and that his family were destitute, and that there was no collusion, etc., and the Court, upon the bill and answer, refused an injunction:

Held, That this Court will not interfere with the discretion of the Judge below in refusing an injunction under the facts in this case, and that the employment and payment of the principal defendant as stated did not discharge the surety from liability on the judgment.

Sureties. Before Judge GREEN. Rockdale Superior Court. May Term, 1871.

This case is sufficiently reported in the opinion.

A. M. SPEER; S. C. McDANIEL, for plaintiff in error.

M. ARNOLD, for defendant.

LOCHRANE, Chief Justice.

It appears, by reference to the facts in this case, that Hollingsworth, the plaintiff in error, instituted his complaint in equity against J. B. Tanner, praying injunction to stop the enforcement of certain *fi. fas.* At the hearing Tanner made answer, and upon argument the Court refused the injunction. This judgment of the Court, refusing the injunction, was excepted to, and is the error assigned.

The bill sets up that sometime in 1861 Hollingsworth became the security of one Peter Mosely, upon certain notes which he gave to a party named Sprayberry, which had been sued to judgment, and subsequently transferred by Spray-

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berry to J. B. Tanner. The bill alleges that while Tanner was the owner of these judgments he became, by contract, indebted to Mosely, the principal in the notes, in the sum of three hundred dollars, or a sum exceeding the amount of the *fi. fas.*, and that, in fraud and violation of the equities of the complainant, he did combine and confederate with Mosely and settled and paid him off, still holding the *fi. fas.* unsettled, which payment he avers was without his consent or knowledge.

Mr. Tanner, in his answer to that part of the bill, says that sometime in September, 1864, he procured the services of Mosely to take some negroes belonging to him out of the way of the Federal army, for which he paid him in Confederate money, at the time the services were rendered, amounting to \$255 00, in old issue, and that his family were in great destitution, and he paid him for the service to relieve him and his family, etc. He denies all fraud or collusion, and gives a statement of the facts as they occurred.

The ground of equity urged by the complainant is that, inasmuch as the holder of the *fi. fas.* had in his hands this money and paid it over to Mosely, the principal in the notes upon which the *fi. fas.* were based, by this act, he has discharged the surety, and that equity ought to interfere by injunction to stop the collection of the *fi. fas.* out of the property of the security, the plaintiff in error. The decision of this Court in 3 Kelly, *Curran vs. Colbert*, 239, is invoked to sustain the doctrine, that any act of the holder which increases the risk of the surety will discharge the surety. That case was the dismissal of a levy and the release of the property of the principal, levied on by a creditor having judgment against the principal and surety, without the privity of the surety. But the doctrine is clearly recognized as settled in the books that "*mere indulgence, unless given upon a new and distinct consideration, or unless given under such a binding obligation as precludes the creditor from pursuing his remedy on the debt, will not discharge the surety.*"

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Now, after judgment against the principal and surety, (for that is this case,) the rule is, that any act of the creditor which discharges the lien of the judgment, discharges also the obligation of the surety, and if the *fi. fa.* were levied upon the property of the principal defendant, and the levy dismissed by the creditor, whereby injury resulted to the surety, it is just that such act should enure to his discharge. The contract of suretyship is one of strict law, and the creditor to retain his lien on the property of the surety, must do no act which discharges the principal, or which endangers the rights of the surety, or by which he changes the original rights of the parties at the time the contract was made.

But while these doctrines found in our Code are fully recognized, we do not think the case made by the bill and answer presents such a case by the pleadings. Was the employment of Mosely to discharge a service for the creditor, for which he was to be paid, and for which he was paid at the time, such an act as injured the surety, or varied the contract and obligation of suretyship in the original agreement? We think not. The answer exhibits the facts, under such circumstances, as negatives all motives of fraud or collusion. He was the owner of a judgment against him and complainant as surety, and while holding this judgment he employed the principal defendant for a specific duty, at a certain price, and paid him; he was destitute and his family needed the actual payment for his services to live at the time. In no sense could this act be regarded, under our law, as a discharge of either principal or surety. And we therefore affirm the judgment of the Court below.

Judgment affirmed.

Baker vs. Bower.

D. A. BAKER, plaintiff in error, vs. G. M. T. BOWER, defendant in error.

1. When a sheriff was notified in writing that an execution placed in his hands was founded on a debt which was for the purchase money of land claimed as a homestead, and, having failed to make the money, was ruled for the amount of the execution :

Held, That the sheriff was liable to be ruled for the value of the land he was notified to levy on and sell, that being the extent of the injury which the plaintiff sustained by the failure of the sheriff to perform his legal duty ; and that the rule should have been made absolute against him for that amount, and not for the amount due on the execution, if that exceeds the value of the land.

2. The resolution of the General Assembly prohibiting the levy of and sale under executions founded upon debts contracted prior to June, 1865, is not a good excuse for a sheriff who failed to collect the money on such execution. (R.)

Rule against Sheriff. Relief. Homestead. Before Judge GREEN. Newton Superior Court. March Term, 1871.

In 1859 Henry Camp, as trustee of Sarah A. Camp, and James D. Johnson, as security, gave a promissory note to A. P. G. Harris, reciting in it that it was "for the land late residence of West Harris, deceased." A. P. G. Harris sold this note to Baker. Johnson died and Pace administered on his estate. Baker had sued and obtained judgment on said note ; it became dormant, and was revived in December, 1869. In April, 1870, a *fi. fa.* was issued. On the 16th of May, 1870, plaintiff's attorney delivered to Bower, the sheriff, a written order "*at once* to levy the *fi. fa.* on the land adjoining (him) you, that purchased of Harris, and now in possession of said Henry Camp and family, the judgment and *fi. fa.* being for the purchase-money of said land. In default I shall seek to execute the law."

On the 29th of July, 1870, Bower levied the *fi. fa.* on said land, stating in the levy that it was done under said order. On the 4th of August, 1870, Camp, as trustee, made affidavit that he desired to take the benefit of the

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Relief Act of 1868. Thereupon, Bower suspended proceedings. Plaintiff's counsel ruled him for the money. He answered that he made said levy under said order, as aforesaid, and, when about to advertise the land for sale in September, received said affidavit and stopped proceedings, because he was advised and believed it was his duty, so to do, and returned the papers to Court, that the relief matter might be disposed of. Further, he said that when said order to levy was given there was in existence a resolution of the General Assembly prohibiting the levy on and sale of property under any *f. fa.*, founded upon a debt contracted prior to the 1st of June, 1865, and he could not, without disregard of said resolution, sell said property. He notified plaintiff's attorney that he would proceed, if he would give to him a bond of indemnity to protect him for selling the property. Further, he answered that said property had been set apart by the Ordinary as Camp's homestead. At the hearing, the plaintiff's counsel put in evidence the original note, etc., aforesaid. The Court discharged the rule, and that is assigned as error.

CLARK & PACE, for plaintiff in error.

JOHN J. FLOYD, for defendant.

WARNER, Judge.

This was a rule against the sheriff, calling on him to show cause why he should not pay to the plaintiff the amount due on an execution against the defendant, or be attached for contempt in failing to execute the process of the Court. The sheriff in answer to the rule showed for cause that the defendant, on the 4th of August, 1870, filed an affidavit under the provisions of the Act of 1868, for the relief of debtors, and to adjust the same on principles of equity, the note on which the judgment was rendered bearing date prior to the 1st June, 1865. The judgment on which the execution is-

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sued is dated 29th September, 1869, that there was a resolution of the General Assembly prohibiting the levy and sale of property under execution on debts contracted prior to 1st June, 1865, and that the property of the defendant has been set apart as a homestead. It appears in the record that the execution was placed in the sheriff's hands on the 16th of May, 1870, by plaintiff's attorney, with written notice that the debt on which the judgment was founded was given for the purchase-money of the land on which he was directed and required to levy the execution, that the sheriff levied the execution on the land as required by the notice, on the 24th of July, 1870. The rule was moved for against him in March, 1871. On hearing the rule and the sheriff's answer, the Court discharged the same, and the plaintiff excepted. The Court, on the statement of facts disclosed by the record, should have made the rule absolute against the sheriff for the amount of the value of the land which he was notified to levy on and sell, that being the extent of the *injury* which the plaintiff has sustained by the failure of the sheriff to perform his legal duty, and not the amount due on the execution, if that shall exceed the value of the land. The Court below erred in discharging the rule against the sheriff.

Judgment reversed.

L. J. GLENN AND SON, plaintiffs in error, vs. WILLIAM SHEARER, defendant in error.

1. When it did not appear in the record that written notice of the sanction of a *certiorari* had been given as required by the 3987th section of the Code :

Held, That the *certiorari* was properly dismissed.

2. There will be no reversal of a judgment, if it was right, upon any ground apparent from the record. (R.)

3. It is a sufficient assignment of errors to recite the facts upon which

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certiorari issued, then state that the Judge dismissed the *certiorari*, and assign that dismissal as error without more. (R. See end of report.)

Certiorari. Practice in Supreme Court. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

At October Term, 1867, of the Justices Court of the 1026 District, Georgia Militia, L. J. Glenn & Son obtained a judgment against Charles Shearer. In February, 1869, they garnisheed Wm. Shearer on said judgment. He answered that he owed Charles Shearer nothing, etc., and his answer was traversed. This issue came on for trial before B. D. Smith, Notary Public and *ex officio* Justice of the Peace for the same district, who had issued the garnishment. He dismissed it upon the ground that he had no jurisdiction over it, inasmuch as the judgment was not obtained before him. L. J. Glenn & Son sued out a *certiorari*, but gave no notice of its sanction to the other party. "After argument had, the Court dismissed the *certiorari* and gave judgment for defendant for costs of suit; to which action, decision and judgment of the Court plaintiff excepts and assigns the same as error."

The bill of exceptions specified no error except as aforesaid. When it was called here a motion was made to dismiss it because it did not sufficiently specify the error complained of. The motion was overruled.

SIDNEY DELL, for plaintiffs in error. The Justice's Court and the Notary Public's Court is the same Court: Constitution of 1868, Article V., 51, section 6; Article XI., section 8. If not so jurisdiction is concurrent: Constitution 1868, Article XI., section 8.

HENRY JACKSON & BROTHER, for defendant.

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WARNER, Judge.

This was a *certiorari* from a Justice's Court, and on the hearing thereof in the Superior Court the *certiorari* was dismissed, but on what special ground the Court dismissed it does not appear. On looking into the record it appears that the *certiorari* was sanctioned by the presiding Judge on the 5th day of March, 1869. There is no evidence in the record of any written notice having been given of the sanction of the writ of *certiorari* as required by the 3987th section of the Code, and therefore the *certiorari* was properly dismissed by the Court below on that ground. In *Turner vs. Collins*, 8th Georgia Reports, 252, this Court held, that it was the uniform determination of the Court not to look out of the papers to inquire into any fact, but whatever fact there appears will be taken to be true, and if it does not appear in writing, it does not exist. The certificate of the Judge to the bill of exceptions is the writ of error to bring up a case from the Superior Court to this Court, and the ten days' notice of the signing and certifying the same has always been required to appear on the record. The sanction of the *certiorari* by the presiding Judge is the writ of error which brings up the case from the Justice's Court to the Superior Court, and the *written notice* of such sanction should appear on the record, otherwise, it will be presumed not to have been given.

Judgment affirmed.

NANCY WODDAIL, administratrix, plaintiff in error, vs.
AUSTIN & HOLLIDAY, defendants in error.

1. When the evidence is conflicting, and there is sufficient evidence to support the verdict, and no error in the charge of the Court which might probably have produced a different result, this Court will not

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- interfere with the discretion of the Court below in refusing to grant a new trial on the ground that the verdict is contrary to the evidence.
2. It is not a ground for non-suit that plaintiff has been adjudged a bankrupt since the suit was begun. (R.)
 3. If plaintiff is adjudged a bankrupt after suit brought, the Court may direct the jury if they find for plaintiff, to find that he recover for the use of his assignee in bankruptcy. (R.)
 4. If irrelevant evidence be introduced without objection, the Court may not charge the jury to disregard it. The party wishing to have it disregarded should move to rule out such evidence. (R.)
 5. If the evidence is confined to an agreed price for goods sold, it is not error in the Court to confine the jury to the agreed price as the measure of damages. (R.)

Bankruptcy. Practice. Charge of the Court. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

Austin and Holliday sued Mrs. Woddail for "one kiln of brick, one hundred and sixty thousand, at \$6 00 per thousand, \$960 00." She pleaded the general issue and payment in full.

Powell testified that he sold the brick to defendant at \$6 00 per thousand, at kiln-count. Holliday testified that there were one hundred and sixty thousand bricks, and that he and Austin had each been discharged as bankrupts since this suit was brought. Crussell testified that, by kiln-count, there were one hundred and sixty thousand bricks in the kiln, and that kiln-count sometimes goes over and sometimes under actual count. Mann testified that he delivered the whole kiln, and that defendant was anxious to know if the brick would "hold out;" but Mann never counted them. Another witness testified that she asked him if they would "hold out," saying she had bought them at kiln-count. It was admitted that defendant had paid plaintiff \$600 00 for bricks, and that were assignees in bankruptcy of said plaintiffs.

Plaintiffs closed. Defendant's counsel moved for a non-suit, because said plaintiffs had been discharged as bank-

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rupts. The Court overruled the motion, saying if there was a verdict against defendant, it should be so framed as to protect the assignees.

For the defendant, her daughter testified that Powell agreed to have one hundred and sixty thousand bricks delivered, at \$6 00 per thousand, and another daughter and defendant testified to the same. And these two testified that but from ninety-eight thousand to one-hundred thousand bricks were delivered, and defendant denied the remarks attributed to her by plaintiff's witnesses. Defendant's son testified that the contract was for one hundred and sixty thousand, at \$6 00 per thousand, by actual count, and that but ninety-eight thousand were delivered; and he added, without objection, that he sold all of them at \$9 00 per thousand.

The Court charged the jury, among other things not material: "If plaintiffs sold, and agreed to deliver to the defendant, a kiln of bricks, to be taken at kiln-count, and at a specific price per thousand, then plaintiff would be entitled to recover, if the bricks were delivered, whatever the kiln amounted to, at kiln-count, at the contract price. If plaintiffs sold, and agreed to deliver to defendant, bricks at an agreed price per thousand, and if, on that contract, they delivered bricks, you will find for plaintiffs the value of the bricks so delivered at that contract price.

If you find for the plaintiffs, you will provide in the verdict that the collection shall proceed for the benefit of the assignees in bankruptcy of plaintiffs. Let it be in this form, substantially: "We, the jury, find for the plaintiffs \$....., principal debt, \$....., interest thereon to this date; the collection to proceed for the benefit of the assignees in bankruptcy of the plaintiffs."

After the conclusion of the charge, defendant's counsel, orally, requested the Court to charge the jury, "that the fact that defendant had sold the brick at a higher price than she had paid for them, could not influence them in finding a ver-

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dict." He declined so to charge, saying the charge, as given, precluded the jury from taking such a view of the case. The jury found, in the form given, for plaintiffs, for \$360 00, principal, \$106 05 interest, and costs of suit.

Defendant's counsel moved for a new trial, upon the grounds that the Court erred in refusing to non-suit plaintiff; in refusing to charge as orally requested; in the form of verdict furnished to the jury; and because the verdict is contrary to law, being in favor of assignees who were not parties; and because it is contrary to the evidence, etc. The new trial was refused, and error is assigned on each of said grounds.

L. J. GARTRELL; HENRY JACKSON, for plaintiff in error. The charge should have been given, though orally requested: 35 Ga. R., 241; 20th, 528; 17th, 206, 446; 15th, 192. Request to be in writing was by Act of 1854. The verdict is uncertain, and cannot be executed: 27 Ga. R., 470; 40th, 153.

TIDWELL & FEARS; M. ARNOLD, for defendants.

WARNER, Judge.

This was an action brought by the plaintiffs against the defendant on a contract for the purchase of a kiln of brick, and on the trial the main question at issue between the parties, was whether the bricks were sold by the plaintiffs to the defendant at \$6 00 per thousand, at kiln-count, or at that price per thousand as the same were delivered to the defendant. On this point in the case the evidence was contradictory and conflicting. The jury found a verdict for the plaintiffs. It also appears in the record that after the commencement of the suit, the plaintiffs had been declared bankrupts. A motion was made for a new trial on the ground that the Court erred in saying to the jury that if they found for the plaintiffs, they should find their verdict in the name of the

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plaintiffs, for the use of their assignee in bankruptcy, and suggested to them the form of their verdict. We find no error in the ruling of the Court on this point in the case. The verdict and judgment will be a sufficient protection to the defendant, and it was not a matter of concern to her who got the money, if she owed it. Besides, it does not affirmatively appear that her legal rights were in any manner injured on the trial by this ruling of the Court as to the form of the verdict. It appears in the record that evidence was admitted on the trial without objection, that the defendant had sold the bricks at a higher price than she had paid for them. After the conclusion of the charge of the Court to the jury, the defendant's counsel *orally* requested the Court to charge them, that the sale of the bricks at a higher price than the defendant paid for them could not influence them in finding a verdict, which request the Court refused.

It is not by any means certain that it would have been proper for the Court to have expressed an opinion in regard to the evidence admitted before the jury, without objection, that it could not influence their verdict. If the defendant had desired to have got rid of that evidence before the jury, the proper manner to have done so, would have been to have moved the Court to rule it out when it was given in, and not to have admitted it without objection, and then to request the Court to charge the jury that they could not consider that evidence; for if the charge had been given as requested, and the jury had found a verdict for the defendant, the plaintiffs might have complained that the Court had invaded the province of the jury, by instructing them that they were not to consider the evidence which was before them without objection. The Court was bound to consider the rights of the plaintiffs, as well as those of the defendant, in charging the jury in relation to the evidence before them. But the charge of the Court as given to the jury, excluded from their consideration any other price for the bricks than *the contract price*. The Court charged the jury, that "if it should ap-

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pear to you from the testimony, that the plaintiffs sold and agreed to deliver to the defendant a kiln of brick, to be taken at kiln-count, and at a specified price per thousand, then plaintiffs would be entitled to recover, if the bricks were delivered, whatever the kiln amounted to at kiln-count, *at the contract price*. If the testimony should satisfy you that plaintiffs sold and agreed to deliver to defendant brick at an agreed price per thousand, and that, on that contract, they delivered brick, then you will find for the plaintiffs the value of the brick so delivered *at that contract price*.

We find no error in this record which will authorize this Court to interfere with the discretion of the Court below in overruling the motion for a new trial in this case.

Judgment affirmed.

G. S. RUTLEDGE *et al.*, plaintiff in error, vs. R. B. BULLOCK, Governor, defendant in error.

1. The jurisdiction of a Judge of the Superior Court is co-extensive with the limits of the State, and the Judge of one circuit may hold a Court in another Circuit than that for which he was appointed.
2. Parties are bound to take notice that Court may be held at the time and place fixed by law, though there may be no Judge for the Circuit which embraces that place. (R.)

Jurisdiction of Judge of Superior Court. Before Judge HOPKINS. DeKalb County, Chambers. February, 1871.

Hardin stood the security of Rutledge for his appearance to answer for an assault. At September Term, 1869, Rutledge did not appear, and a rule *nisi* for forfeiture of the bond was taken. *Scire facias* was issued and served in December, 1869, returnable to the next term of the Court in March, 1870. On the 3d of January, 1870, Judge Pope then Judge of the Superior Court of said county, resigned, and his vacancy was not filled by appointment till August

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1870. Judge Pope, before resigning, had not invited any Judge to hold the March Term, 1870, of DeKalb Superior Court.

Governor Bullock requested Judge Parrott, of the Cherokee circuit, to go and hold said term of said Court, and he went. When said cause was called Rutledge was not present, nor did Hardin render any excuse for his non-delivery; but, by his counsel, contended that said Court was being illegally held, in that Judge Parrott had no right or authority to hear or determine the cause, for the reasons aforesaid. The Judge overruled this objection. Counsel for Hardin then said that they had not known till a day or so before that any Judge would hold said Court, there being no Judge of the circuit in office, and he had so informed Hardin, and Hardin said for that cause he did not deliver Rutledge, but that he would produce him the next day, if the time were allowed. The Court gave final judgment against him. By consent, all other civil business was passed. No criminal business was done except sentencing two parties who pleaded guilty, and Court adjourned after having sat but three or four hours.

Fi. fa., issued upon said judgment, was levied upon Hardin's land. He filed an oath of illegality, upon the ground that Judge Parrott had no authority to hold said Court. He gave no bond for the forthcoming of the land.

When this illegality was heard, by consent, at Chambers, the Solicitor General moved to dismiss it, because no forthcoming bond was given, and because Judge Parrott did have a right to hold said Court. That is assigned as error.

L. J. WINN; A. W. HAMMOND & SON, for plaintiff in error.

E. P. HOWELL, Solicitor General, for the State. Constitution of 1868, Art. 5, sec. 10, par. 3; 11 Ga. R., 438; R. Code, secs. 232, 237, 238.

WARNER, Judge.

This case came before the Court below on an affidavit of illegality to an execution which was issued on a judgment of a forfeited recognizance rendered against the defendants at the March Term, 1870, of DeKalb Superior Court. The main ground of illegality taken by the defendants in the affidavit, was that there was no Judge in the Atlanta Circuit, and that the Court was held by Judge Parrott, a Judge of another Circuit, who had no legal right or authority to hold the Court and render the judgment in said case under the following agreed statement of facts: "That Judge Pope, the Judge of the Atlanta circuit resigned on the 3d day of January, 1870, and the Atlanta circuit was without any Judge until August, 1870, when Judge Lochrane was appointed to fill the vacancy. That the March Term of DeKalb Court, 1870, was held by Judge Parrott without the request or invitation of Judge Pope, but on the request of Governor Bullock, and that the judgment in the case was rendered on the 7th day of March, 1870, when the Court was held by Judge Parrott, the Judge of the Cherokee circuit, the Atlanta circuit being without a Judge." The third section of the fifth article of the Constitution declares, "there shall be a Judge of the Superior Courts for each judicial circuit. He may act in other circuits when authorized by law." The 232d section of the Code declares, "The *jurisdiction* of the Judges of the Superior Courts is *co-extensive* with the limits of this State, but they are not compelled to alternate unless required by law. By the 233d section of the Code it is declared, that "each of said Judges shall discharge all the duties required of him by the Constitution and laws for the circuit for which he was elected or appointed, although he may hold Courts in other circuits, and may also exercise *other* judicial functions for them, when permitted by law;" that is to say, the Judge of one circuit may hold Courts in other circuits in the State, and may also exercise other judi-

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cial functions for other circuits when permitted by law, as to grant writs of injunction, *certiorari*, and other writs, whenever the resident Judge of a circuit is absent or interested, etc., as provided by the 238th section of the Code. We are, therefore, of the opinion that the Judge of one circuit may rightfully and lawfully hold a Court in another and different circuit in the State than that for which he was appointed. But it is said if the Governor shall fail or refuse to appoint a Judge for a circuit when a vacancy occurs, as in this case, he can compel the people of the circuit to have their legal rights determined by any Judge in the State who he may think proper to force upon them. That may be so, but the failure of the Governor to perform his constitutional duty in making an appointment to fill a vacancy when it occurs, is one thing, for which he is responsible to the proper tribunal. The legal power and authority of a Judge of one circuit to hold a Court in another circuit of the State, is an entirely different thing. The failure of the Governor to appoint a Judge for the Atlanta circuit, however objectionable that failure in the performance of his official duty may have been, did not divest the Judge of the Cherokee circuit of the legal power and authority to hold a Court in the Atlanta circuit at the time appointed by law, of which all parties having business in that Court were bound to take notice.

Let the judgment of the Court below be affirmed.

F. A. WILLIAMS, plaintiff in error, vs. ADOLPH G. MAND-
DELL, defendant in error.

1. A plaintiff who resides out of the State is not required to pay taxes on his debt under the provisions of the Act of 1870.
2. A fact admitted in the bill of exceptions may be the basis of an affirmance of the judgment below, though that fact did not appear in the proceedings below. (R.)

Relief Acts of 1868 and 1870. Taxes. Before Judge HOPKINS. Fulton Superior Court. April Term, 1870.

In April, 1866, Mandell obtained a judgment against Williams for \$196 00, principal, and \$68 25 interest. *Fi. fa.* was issued and levied upon William's property in March, 1869. Williams filed his affidavit that said judgment was founded upon a contract made prior to June, 1865, and that he desired to take the benefit of the Relief Act of 1868. The cause was continued. In February, 1871, he filed an amendatory affidavit, stating that he had filed the other, and now wished the benefit of the Relief Act of 13th of October, 1870, that plaintiff had not filed an affidavit of the payment of taxes as required by said last Act, that he, Williams, had lost by the results of the late war \$15,000 00, and that he had not had the benefit of any former reduction on said debt because of such loss.

When the cause was called for trial, Mandell's counsel moved to dismiss said affidavits, and that the *fi. fa.* proceed. Williams' attorney proposed to prove that this cause was tried when he was at home, sick in bed, and in the absence of his counsel, and that he did not owe the debt. The Court rejected this evidence, dismissed the affidavits and ordered the *fi. fa.* to proceed. Williams sued out his writ of error, assigning said action as error. In *it* he admitted that Mandell was a citizen of New York when the judgment was obtained, and ever since.

FARROW & THOMAS, for plaintiff in error. Relief Act of 1870 is constitutional. Non-residence makes no difference: Article 4th, section 2d, Constitution of United States; Cooley's Con. L., 397; Revised Code, sections 2211, 2212, 2213, 3522, 3523, 797, 800, 826. As to relief, see 40 Ga. R., 494, 327.

L. J. GLENN & SON, for defendant. First affidavit was insufficient without more: 40 Ga. R., 326. Loss not as-

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cribed to Mandell: 40 Ga. R., 154, 175. Non-resident owes no tax on judgments here: Collins *vs.* Miller, this term. Evidence offered inadmissible: Revised Code, section 3450; 40 Ga. R., 493.

WARNER, Judge.

This was an affidavit of illegality filed by the defendant to the plaintiff's execution, claiming the benefit of the Relief Act of 1868, for losses sustained by the war, and on the ground that the plaintiff had not filed an affidavit of the payment of taxes due on the debt, as required by the Act of 1870. The affidavit did not show that the plaintiff was in any way connected with the defendant's loss of property by the war. It also appeared in the record that the plaintiff resided in the State of New York at the time the judgment was obtained, and has resided there ever since that time. The Court dismissed the affidavit of illegality and the defendant excepted. Held, that there was no error in the Court below in dismissing the affidavit of illegality on the statement of facts disclosed by the record.

Judgment affirmed.

THOMAS A. WALKER, plaintiff in error, *vs.* ALBERT M. RIXEY, defendant in error.

It is error for the Court to charge the jury upon an assumed state of facts not disclosed by the evidence in the case.

For the necessary facts, see the opinion.

UNDERWOOD & ROWELL; PRINTUP & FOCHE, for plaintiff in error.

WRIGHT & FEATHERSTON; SMITH & BRANHAM, for defendant.

WARNER, Judge.

This was an action by the plaintiff against the defendant on three promissory notes for the sum of \$16,498 00 for the rent of a plantation in the State of Alabama, two of said notes due 25th December, 1867, and the other due 25th December, 1868. The notes were signed by the defendant and Porter, who rented the plantation, as partners, for three years. After working the plantation one year, Rixey, the defendant, came to this State, and one of the main grounds of defense was that the plaintiff had evicted the defendant from the plantation after the first year, and had cultivated the same in conjunction with Porter, the other partner, for the remaining two years. The evidence in the record is quite voluminous, and conflicting in relation to some questions involved in it. On the trial of the case the jury found a verdict for the plaintiff for the sum of \$500 00 only. A motion was made for a new trial on several grounds, one of which was that the Court erred in charging the jury at the request of defendant's counsel, that "If the evidence shows that plaintiff and Porter have colluded together, and have taken possession of the farm, and have excluded Rixey the defendant from participation in its management, then Rixey is discharged from liability from the time of such collusion and eviction, and the jury may consider how the cotton raised on the place was marked, how the crops were made, who controlled the crops, who made advances, in determining this question." The Court overruled the motion for a new trial, and the plaintiff excepted. In our judgment, the Court below erred in charging the jury in relation to the plaintiff having colluded with Porter to take possession of the farm and excluding the defendant from participation in the management of it, inasmuch as there is no evidence in the record of such collusion to authorize the charge as given. Not being satisfied with the verdict rendered in this case from the evidence disclosed in the record, we reverse the judgment

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of the Court below for error in the foregoing charge of the Court to the jury, and order a new trial.

Judgment reversed.

J. P. CLEMENTS, plaintiff in error, vs. J. E. LOGAN, defendant in error.

When a bill was filed praying for an injunction to restrain the defendant from obstructing a road over his own land, and the complainants did not show that they had the legal right to use the road over the defendant's land, as a private way, or that the road had ever been established by the proper authority as a public road, or that it had been worked or recognized by the public authorities of the county as a public road, so as to give the complainants a prescriptive right to use it as such over the defendant's land :

Held, that the injunction was properly refused.

Injunction. Roads. Before Judge PARROTT. Whitfield county. Chambers. May, 1871.

Clements, on behalf of himself and other citizens of Tunnell Hill and vicinity, sought to enjoin Logan from obstructing a road. The bill made this case: This road runs over Tunnell Hill ridge from the village to the country, and has existed more than twenty years in peaceable, continuous and uninterrupted use. It is of great use to said citizens as a short way to their farms and to the country. It passes through land claimed by Logan, about two hundred and fifty yards. Logan has built fences across it, and put gates thereto and locked them, and when the citizens have broken these locks and pulled down these fences Logan restored them. Upon Clement's application two Justices of the Peace had a jury of freeholders to try whether said obstructions were not a nuisance. After due notice to Logan, a trial was had, the jury found that the same were a nuisance, the Justices ordered it abated, and the sheriff tore them away. Yet Logan has applied for a *certiorari*, and says that when that

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is granted he will restore said obstructions *in statu quo*. This will prove of great inconvenience to him and other citizens, and Logan is insolvent, and cannot pay damages.

The Chancellor ordered Logan to show cause why the injunction should not issue. He answered that he bought and paid for the land in 1866, made a private way for himself to the railroad, got the railroad authorities, in 1869, when fencing in their right of way, to leave gates so as to enable him to pass by his private way, and paid them for the absolute control of said gates; that on the 20th of April, 1871, he was notified to appear and have said trial as to nuisance on the 22d of April, 1871; that he appeared, and moved to continue, because he had not had time to procure an attorney and summon his witnesses, but the Justices ordered the trial to proceed, the finding was against him, and he sued out *certiorari*, intending, in good faith, to abide the decision of the Judge of the Superior Court on its hearing. This *certiorari* was sanctioned on the 25th of April, 1871, the same day on which he was ordered to show cause against said injunction. He said that he would be damaged, say \$280 00, by said way being used as a road, that it was no road, and never had been legally made even a private way. He admitted his unwillingness to allow the passage over his land without compensation, said it was all he had, and was worth only about \$500 00, and said he would prevent the passage unless the Court decided against his right to do so. He admitted that it was a convenience to the citizens, but said it was not a necessity, because a road but little distant went over said ridge. At the hearing there were affidavits by several persons fully sustaining the allegations of the bill, but none that said way had ever been legally designated or fixed or traveled as a road. On the contrary there were others sustaining the main allegations in the answer. A more extended notice of them is not material here. The Chancellor refused the injunction, and that refusal is assigned as error.

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McCUTCHEN & SHUMATE, for plaintiff in error.

JOSEPH GLENN, for defendant.

WARNER, Judge.

This was a bill filed by the complainants against the defendant praying for an injunction to restrain him from obstructing a road on his own land. After hearing the argument on a motion to show cause why the injunction prayed for should not be granted, the Court refused to grant the same; whereupon the complainants excepted. It appears from the record that the obstructions to the road had been complained of as a nuisance, and a trial had before the Justices of the Peace and a jury summoned for that purpose, and a verdict rendered by them that the obstruction of the road by the defendant was a nuisance, which was abated by the sheriff, that the defendant had obtained a *certiorari* of the proceedings had on the trial before the Justices to the Superior Court for alleged error in that trial, and that the defendant threatened to renew the obstructions to the road. The complainants do not show from the evidence in the record that they had the legal right to use this road over the defendant's land as a *private way*, either by prescription or otherwise, nor does the evidence show that the road had ever been established by the proper authority as a *public road*, or that it had ever been worked, or recognized by the public authorities of the county as a public road, so as to give to the complainants a prescriptive right to use it as such over the defendant's land. In view of the facts of this case, as disclosed by the record, we will not interfere with the discretion of the Court below in refusing to grant the injunction prayed for.

Let the judgment of the Court below be affirmed.

Baker *et al.* vs. Roath *et al.*

DOE *ex dem.*, W. W. BAKER *et al.*, plaintiffs in error, vs. ROE, *casual ejector*, and ROBERT ROATH *et al.*, tenants, defendants.

The 7th section of the Act of 1869, limiting the time of actions for torts committed, applies only to such torts as were committed prior to the 1st June, 1865, and not to torts committed since that date.

Ejectment. Limitation of Actions. Before Judge PARROT. Whitfield Superior Court. May Term, 1871.

This was ejectment by John Doe upon a demise for twenty years from S. W., L. L., M. G., and A. W. Stevenson, jointly, on the 1st of January, 1864, upon the demises of each of them on said day, and on the demise of William W. Baker on the 5th of December, 1869, against Roe, casual ejector, and Robert Roath *et al.*, tenants in possession. It was filed on the 20th of December, 1869.

The *locus* and possession at beginning of the suit, and that the title was in Cox when he conveyed it, were admitted. Plaintiff then read in evidence a deed from Cox to Thomas J. Stevenson made in 1842, and a deed from said S. W., L. L., M. G. and A. W. Stevenson to said Baker, made the 5th of December, 1869, and showed that these Stevensons were the sole heirs at law of said Thomas J. Stevenson, who died on the 11th of October, 1862, and closed.

Defendant read in evidence a *fi. fa.* against S. W. Stevenson, Sr., founded upon a judgment in October, 1841, and a deed from the sheriff of said county to James Edmundson, who bought the land at sheriff's sale under said *fi. fa.* in 1843, and a deed from Edmundson to John Hamilton made in 1844. It was admitted that Edmundson and Hamilton each knew when he purchased that the title to said land was in Thomas J. Stevenson, a minor. Under the facts and circumstances herein stated, it was admitted that Hamilton took possession in 1844, died in possession, and the tenants are the

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tenants of his administratrix, said possession having been uninterrupted, etc.

It was shown that one Cox had become bound to convey certain land to S. W. Stevenson, Sr., and could not comply, and offered to convey him the premises in dispute if he would surrender his bond. This vexed Mr. S. W. Stevenson, Sr., and he went to the field. His wife then told Cox that if he would convey the premises in dispute to her infant, then twelve days old, said Thomas J. Stevenson, she would surrender Cox's obligation to her husband. Cox made the deed to the child, got his bond from Mrs. Stevenson, and left.

S. W. Stevenson testified that he was then perfectly good, did not authorize Cox to make said deed, and had nothing to do with it except as aforesaid, and that the whole matter was conceived and carried through by his wife; that there was no intention to defraud his creditors, for that he then owned \$2,000 00 worth of property, and owed but \$125 00; that he knew nothing of said sale by the sheriff till a month after it was over. He said his only reply to Cox, when he proposed to make him title to the premises in dispute upon his giving up his, Cox's, bond, was that, if that was all he could do, he would not take anything, and left him.

When the evidence closed defendant's counsel moved to dismiss the action, because it was barred by the Limitation Act of 1869. "There being no controversy as to the time of the accrual of the cause of action," the Court dismissed the case. That is assigned as error.

D. A. WALKER; McCUTCHEN & SHUMATE, for plaintiffs in error. This tort was continuous, and therefore right of action accrued after as well as before 1865. Acts of limitations do not apply to ejectment: 38 Ga. R., 439; 2 Crabb's R., Pr., sec. 2477, page 1079. No prescription in favor of persons knowing defects of their title: R. Code, secs. 2637, 2641; 7 Ga. R., 390; 35th; 140, 142.

W. K. MOORE, for defendant.

WARNER, Judge.

This was an action of ejectment brought by the plaintiff on the several demises alleged in the declaration against the defendants, to recover the possession of a tract of land in Whitfield county. The demise from the Stevensons to the plaintiff is alleged to have been made on the 1st day of January, 1864. The demise from Baker to the plaintiff is alleged to have been made on the 5th day of December, 1869. The action was commenced on the 20th December, 1869. The plaintiff and defendant offered in evidence their respective title deeds to the land in dispute, as well as other evidence in regard to their claim to the land. After the testimony in the case was closed, the defendant's counsel made the point to the Court that the plaintiff's cause of action was barred by the Act of 1869, in relation to the Statute of Limitations, under the evidence in the case. The Court sustained the position taken by the defendant's counsel, and held that the plaintiff's action was barred, and dismissed the same; whereupon the plaintiff excepted. The seventh section of the Act of 1869 declares, "That all actions for torts of any character whatever, when the tort or wrong was committed, or the right of action accrued, or the injury was done whether to the person or property of any person or corporation prior to the 1st June, 1865, by any person then or now a citizen or inhabitant of this State, which is not now barred, shall be brought and prosecuted within three months from the passage of this Act, or the right of action of the injured party or plaintiff in the action, as well as the right of such party to sue, shall be forever extinguished, barred and foreclosed." This section of the Act applies only to such torts as were committed prior to the 1st June, 1865, and not to torts committed since that date. If the defendant was in possession of the land before that date, the plaintiff, to recover for that wrong or injury, must

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have sued within three months from the passage of the Act; but if the defendant has been in possession of the land since that date (as the evidence shows that he was) then, for the wrong and injury done to the land since that time, the plaintiff was not bound to sue within three months. Besides, one of the demises in the declaration to the plaintiff is alleged to have been made on the 5th of December, 1869, and the defendant was in possession of the land. In our judgment, the Court should have allowed the jury to have passed upon the evidence under the charge of the Court as to the law applicable thereto, and it was error to dismiss the plaintiff's action on the statement of facts disclosed by the record.

Let the judgment of the Court below be reversed.

CHARLES ABERCROMBIE, plaintiff in error, *vs.* N. BAXTER
et al., defendants in error.

That part of the 15th section of the Act of 1870 which authorizes the defendant to elect to give up the property in his possession, for which the contract was made, in full discharge of his indebtedness, impairs the obligation of the plaintiff's contract, and is unconstitutional and void.

Relief Act of 1870. Sureties. Before Judge PARROTT.
Gordon Superior Court. April Term, 1871.

By consent this cause was submitted to the Judge for decision upon the following agreed facts. Abercrombie obtained a judgment against Baxter, Baxter sued out a writ of error to the Supreme Court, and gave bond for *supersedeas*. The judgment was affirmed by the Supreme Court, and a motion was made to enter judgment against the sureties on said *supersedeas* bond. Pending this motion the *fi. fa.* against Baker was attacked by an oath of illegality. It made this case: In 1860 Abercrombie sold Baxter certain land at

D. A. WALKER, for plaintiff in error. Relief Act unconstitutional because it impairs obligations of contracts. Judgments vs. Sureties. Robinson vs. Dumas, January Term 1871. Acts of 1870, page 92.

W. H. DABNEY, for defendants.

WARNER, Judge.

This was an affidavit of illegality to an extent - -
ground that the defendant had elected to give - -
which was the consideration of the debt for - -
action was issued to collect, in full discharge - -
edness to the plaintiff under the provisions - -
tion of the Act of 1870. The Court ~~was~~ - -

Lowery vs. Davidson et al.

of illegality, and ordered that the title to the land be vested in the plaintiff, and the execution against the defendant, Baxter, be entered satisfied, to which ruling of the Court the plaintiff excepted. This case comes within the principles of the decision in *Gunn vs. Hendry*, decided during the present term. So much of the 15th section of the above recited Act as authorizes the defendant to elect to give up the property in his possession for which the contract was made, in full discharge of his indebtedness, impairs the obligation of the plaintiff's contract, and is unconstitutional and void.

Let the judgment of the Court below be reversed.

J. H. LOWERY, plaintiff in error, *vs.* J. E. DAVIDSON *et al.*,
executors, defendants in error.

1. When an exemplification of the probate of a will in another State is filed in the Clerk's office in this State under the provisions of the 2414th section of the Code, properly authenticated according to the law of the State of the testator's domicil, it is sufficient to authorize the executors of the testator to sue in the Courts of this State.
 2. Certain cotton receipts were given to Davidson, the testator, in his lifetime, by the defendant, subject to the demand of Davidson or his order, and on the back thereof was written, "Deliver to T. N. Johnson, or order. W. Davidson : "
- Held*, that this did not vest the title to the cotton in Johnson as against Davidson's legal representatives, but that it was competent to prove by Johnson that he was merely the agent of Davidson to receive the cotton and had no personal interest in it, and that the indorsement on the back of the receipt was made for that purpose only.
3. When a defendant, in a Court of law, seeks to avoid his contract on the ground of *mistake*, he must, by his pleadings, allege the grounds of the mistake as fully as he is required to do in a Court of equity to entitle him to relief.

Administrators and Executors. Evidence. Pleading.
Before Judges ANDREWS and GIBSON. Richmond Superior
Court. January Term, 1871.

The executors of William Davidson averred that, on the 1st of February, 1863, he owned and possessed twenty-eight bales of cotton, that they were casually lost, that Lowery found them, and, on the 30th of September, 1866, converted them to his own use to their damage, etc. On the trial, to show their authority to sue as executors, they offered in evidence a copy of Davidson's will and their letters of executorship, which were authenticated by a certificate purporting to be made in Charleston District, South Carolina, and which concluded as follows: "And I do further certify that I am sole Judge of the Court of Ordinary of Charleston District in said State, and there is not, by law, any Clerk of said Court, and that, in my official capacity as Judge, I am, also, *ex officio*, in the law, the sole Clerk, nor is there any other officer of said Court, nor any other Judge, Chancellor or Vice-Chancellor of the said Court, having supervision of the acts of the Judge of the Court of Ordinary of the District and State aforesaid. And I do further certify that the said Court is a Court of record, and that the records of said office are in my sole possession, keeping and custody and under my sole control; and I do further certify that this testimonial and the foregoing attestation is in due form of law." It was signed by him officially, "George Buist, Judge of Probate," and to it was attached the official seal of said Court. Defendant's counsel objected to this evidence because it was not certified by the Clerk of the Court but by its Judge. The objection was overruled and the paper was read as evidence.

Plaintiff's counsel next read in evidence two receipts headed "J. H. Lowery, Warehouse and Commission Merchant, Augusta, Georgia"—one dated the 1st of February, 1863, the other without a date, each signed "John Holmes, for the proprietor," each acknowledging the receipt of fourteen bales of cotton from William Davidson, "marks, etc., as per margin, subject to this receipt or his order," on paying, etc.

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On the margin of each receipt were numbers from one to fourteen, and opposite each number the weight of a bale of cotton. Under the heading "marks," on the dated receipt, there was nothing; in the other receipt there were the letters "H D F." On each receipt was indorsed: "Deliver to T. N. Johnson, Esq., or order. W. Davidson."

They then proved the demand of said cotton from Lowery and his refusal to deliver it before the action was begun, and the value of the cotton, and closed. Defendant's counsel moved for a non-suit upon the grounds that it was not shown, by legal evidence, that said plaintiffs were Davidson's executors, for the reason aforesaid as to said certificate, and because, by said indorsement on the receipts, the right to sue was out of them and in Johnson. The Court refused the non-suit.

Plaintiff's counsel then asked to open the cause to prove by Johnson that the indorsement to him was simply to enable him, as Davidson's agent, to get the cotton, and that he had no interest in it. This was objected to upon the ground that it was varying a written contract by parol, but the Court allowed Johnson to be examined, and he so testified. Plaintiff's witnesses to the demand testified that when Lowery refused to deliver the cotton, he said he could not because he had delivered it to Dr. Hall. This Dr. Hall testified that, during the war, when the Confederate States authorities were seizing houses for storage, Lowery told him that he had in his warehouse twenty-eight bales of cotton belonging to the estate of George Y. Davis, deceased, and that he, Hall, had better take it away, and he did take it; that soon after Davis' death said Johnson seemed to know all about Davis' affairs, gave Hall information as to Davis' property, said he had a claim against the estate of Davis, and spoke of this cotton several times, and Hall promised to pay his claim, which was for burial expenses of Davis, when he sold said cotton. Hall sold the cotton and paid Johnson's bill to Johnson or his clerk or agent. Johnson seemed solicitous about Davis' affairs and relatives, asked frequently about

them, and asked for, and got from Hall, Davis' watch to send to Davis' relatives. Afterwards Johnson's clerk presented to Hall these said receipts, and said Johnson wished to know if he knew anything of the cotton therein mentioned. This was the first Hall had ever heard of any counter-claim to this cotton, and from the facts aforesaid he had no doubt but that Johnson at first knew that the cotton which he had sold, and out of which Johnson's claim was paid, was the cotton which came from Lowery's. Defendant's counsel offered in evidence defendant's books of original entries to show that the cotton called for by said receipts was stored with him by Davis, and was his, and that the receipts to Davidson were issued by a clerk by mistake. The Court ruled that the books were inadmissible.

In rebuttal, Johnson testified that he had no recollection of Hall's paying his claim for burial expenses of Davis; that he got said watch to send to Davis' sister, and sent it; that he knew nothing about Davis' business, never had a business transaction with him; that he and Davis were refugees from Charleston, Davis was an old and respectable citizen of Charleston, sojourning at Hamburg, buying cotton for Davidson and others in Augusta, and when Davis was sick he waited on him, and when he died, buried him at his own expense; being a trifling expense, as it was paid in Confederate money. He gathered up his personal effects, and handed them to the Clerk of the Superior Court and Hall for administration, and never knew that he had any cotton. He got the watch upon the application of Davis' sister, who resided in Philadelphia. This is the only business he had with the estate.

After argument had the jury retired to consider of their verdict. While they were out defendants' attorneys, as it is alleged, accidentally discovered among some papers in the cause, and which had been in possession of plaintiff's counsel, a receipt from defendant to George Y. Davis, in his lifetime, for the storage of twenty-eight bales of cotton, dated the 1st of February, 1863, at the beginning, and ending with

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the payment of storage on the 5th of January, 1864. There was no other mark to show that it was for the cotton sued for. They made no mention of the discovery, so far as the record shows, until after the jury rendered a verdict for the plaintiff.

Defendant's counsel moved for a new trial upon the grounds that Judge Andrews, who presided on the trial, erred in admitting said record as evidence; in refusing to non-suit plaintiffs; in allowing the cause opened for Johnson's testimony, and in allowing him to testify in explanation of the indorsement of the receipts to him; in rejecting defendant's books; because of said newly discovered evidence, and because the verdict was contrary to law, etc. The motion recited the finding of said receipt as aforesaid, and that its existence was unknown to defendant and his counsel before, but this was not supported by any affidavit. The motion was heard before Judge Gibson, who refused a new trial. Error is assigned upon each of said points.

J. C. SNEAD; CLAIRBORNE SNEAD, for plaintiff in error.

McLAWS & GANAHL, for defendant.

WARNER, Judge.

This was an action of trover brought by the plaintiffs against the defendant to recover the value of twenty-eight bales of cotton. The plaintiffs sued as the executor and executrix of William Davidson, who died in the State of South Carolina. The plaintiffs had filed in the Clerk's office of the Superior Court an exemplification from the record of the Court of Probate of South Carolina, showing the probate of the will of the testator, and the appointment of the plaintiffs as his executors in that State, and relied on the same as evidence of their right and title to maintain their action against the defendant in the Courts of this State, under the provisions of the 2414th section of the Code. This record was objected to on the ground that it was not certified to by

a Clerk. The record was certified to by the Judge of Probate, in which he states that, by the law of that State, there is no Clerk of his Court, that in his official capacity as Judge, he is also *ex officio*, in the law, the sole Clerk thereof, and that this testimonial and the foregoing attestation are in due form of law. In our judgment, this record was properly authenticated according to the law of the State of the plaintiffs' domicile, so as to entitle them to sue in the Courts of this State, under the provisions of the Code before cited, as executors of the deceased testator. On the trial of the case the jury found a verdict for the plaintiffs, and a motion was made for a new trial, which was overruled by the Court, and the defendant excepted. There was no error in admitting the evidence in explanation of the indorsement on the cotton receipts which made the cotton subject to the demand of Davidson, or to his order. The indorsement on the back of the receipts is in the following words: "Deliver to T. N. Johnson, Esq., or order. W. Davidson." The evidence of Johnson shows that, the indorsements on the back of the cotton receipts were only intended to give him authority as the agent of Davidson to receive the cotton; that he had no personal interest in it, and acted only as agent. This did not vest the title to the cotton in Johnson as against Davidson, for whom he was acting merely as the agent, or as against his legal representatives. There was no error in rejecting the books of the defendant in evidence for the purpose of showing that the receipts for the cotton were given to Davidson, instead of to Davis, by mistake, under the pleadings and evidence in this case. If a defendant in a Court of law seeks to avoid his contract on the ground of *mistake*, he must, by his pleadings, allege the grounds of the mistake as fully in a Court of law as he is required to do in a Court of equity, so as to give the adverse party notice, before he can introduce evidence of such mistake, in order to avoid the contract on that ground. There is no allegation in the defendant's plea that the contract set forth in the receipts was the result of

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either accident or mistake, so as to enable him to avail himself of that equitable ground of defense in a Court of law. Besides, it is not very apparent how the defendant's books, containing his own acts, would conduce to show his mistake in giving the receipts for the cotton to Davidson. It may be true that the defendant's books show that the storage on the cotton was paid by Davis, which might have been done as the agent of Davidson, and the fact that the receipts given to Davis by the defendant for the storage are now found in the hands of Davidson's executors, would seem to look that way, although the defendant makes the discovery of that fact a ground for a new trial, as being newly discovered evidence. In view of the facts of this case, as disclosed by the record, we are unable to find any legal ground on which to reverse the judgment of the Court below.

Let the judgment of the Court below be affirmed.

M. A. INMAN, administratrix *et al.*, plaintiffs in error, vs.
D. J. JONES, defendant in error.

When a defendant has had his day in Court he cannot, by an affidavit of illegality, go behind the judgment and attack it on the ground that the consideration of the debt on which the judgment was rendered was the purchase-money due for slaves.

Slave Debts. Estoppel. Before Judge TWIGGS. Burke Superior Court. May Term, 1871.

On the 19th of November, 1868, Jeremiah Inman obtained a judgment against D. J. Jones, principal, and M. D. Jones, security, upon which a *fi. fa.* was issued upon the 25th of November, 1868. In December, 1868, D. J. Jones made affidavit that said judgment "was founded on a debt the consideration of which was for the purchase of slaves," to stop said *fi. fa.* from proceeding. Upon the trial of this oath of illegality it was admitted that the suit in which said

judgment was taken was brought before the adoption of the Constitution of 1868 ; that no defense was made ; that after the adoption of the Constitution of 1868 an award was made in favor of plaintiff against said defendants, and said judgment was entered thereon, and that plaintiff and M. D. Jones are dead.

Plaintiff moved to dismiss the affidavit because it did not, in substance or effect, allege that the consideration of the debt, the foundation of said judgment, was a slave or slaves, or either, or the hire thereof. 2d. That affiant was estopped from making this defense, since said judgment ; that he has had his day in Court, and might have pleaded said facts when said award was made the judgment of said Court. The Court overruled this motion to dismiss the illegality, and error is assigned on said grounds.

JOHN T. SHEWMATE, for plaintiffs in error.

A. R. WRIGHT, for defendant.

WARNER, Judge.

This was an affidavit of illegality to a judgment rendered against the defendant in November, 1868, on the ground that the note on which the judgment was founded was a debt the consideration of which was for the purchase of slaves. The plaintiffs made a motion to dismiss the affidavit of illegality on the ground that the defendant had his day in Court, and was now estopped from going behind the judgment and setting up this defense by an affidavit of illegality. The Court overruled the motion, and the defendant excepted. This case is within the principle decided by this Court during the present term in the case of *Miller vs. Albritton*. The defendant should have pleaded and proved the consideration of the debt on the trial of the case when the judgment was rendered.

Let the judgment of the Court below be reversed.

Leaptrot vs. Robertson.

JESSE A. LEAPTROT, plaintiff in error, vs. E. A. ROBERTSON, administratrix, defendant in error.

1. When an executor or administrator is a party in any suit on a contract of his testator, or intestate, the *other party* shall not be admitted to testify in his own favor.
2. When the evidence is conflicting, and there is sufficient evidence to sustain the verdict, and there is no material error in the charge of the Court which might have probably produced a different result, a new trial will not be granted.
3. As a matter of practice, where a legal, pertinent charge is requested of the Court, in writing, the Court should give it to the jury in the language of the request and not hold up the paper containing the request, after the same has been read by counsel in the hearing of the Court and jury, and say, "Gentlemen, I give you all this in charge as requested."

Party as witness. New trial. Before Judge ROBINSON. Washington Superior Court. December, 1870.

This cause was tried below three times, and each time the plaintiff obtained a judgment against the defendant. The first verdict was for \$4,716 96, the second for \$4,913 50, and the last for \$4,225 61. It was trover for twenty-one bales of cotton brought by George W. Robertson, survivor of G. W. & B. F. Robertson, against Leaptrot. A new trial was granted by this Court at June Term, 1868. See Leaptrot vs. Robertson, 37th Georgia Reports, 586. Before the last trial George W. died and Mrs. Robertson, his administratrix, became the plaintiff.

Plaintiff's counsel read in evidence a receipt showing that in 1863 said firm bought twenty-one bales of cotton from Leaptrot, and paid him therefor and took his obligation to keep said cotton for said firm till called for, and then deliver it at a designated place; proved a demand and refusal to deliver and the value of the cotton and closed.

The defense was that the cotton was burned by Sherman's army in the fall of 1864, before the demand, and defendant showed that his gin-house was so burned, and offered evi-

dence to show that said cotton was then and there burned. Several of his witnesses were negroes.

In rebuttal, plaintiff's counsel introduced evidence to show that said cotton was not so burned. The main evidence on this point were admissions by Leaptrot that said cotton was saved from said fire, which admissions four or five witnesses testified that Leaptrot made to them soon after Sherman's forces burned said gin-house. It was stated by each of these witnesses that neither of said Robertson's was present when any one of said admissions were made. Defendant's counsel then offered to introduce defendant to testify only as to those admissions, and to give his version of the said pretended admissions and his explanation of them. The Court refused to allow defendant to testify thereto because the Robertson's were both dead.

Each side gave the Court written requests to charge the jury. What they were does not appear. He charged the jury, but what he said does not appear. Certain portions of what he charged purport to be in the motion for a new trial. The jury found for plaintiff. Defendant's counsel moved for a new trial upon the following grounds:

1st. Because the verdict is strongly and decidedly against the weight of the evidence.

2d. It is contrary to the following charges of the Court:

1. The preponderance of testimony, when the jury is satisfied it is credible, should control them in civil causes; and unless the negroes sworn were shown to be unworthy of credit by some mode pointed out by law, their testimony is to be received and acted upon as any other testimony in the case.
2. The jury must be satisfied from all the evidence that the cotton burnt was not the cotton sued for.
3. If the jury believe the burnt cotton was that sued for, they should find for defendant, even though defendant believed otherwise and said so.

3d. Because after giving said last charge as requested, the Court, when near the close of his charge, said, "If the ad-

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missions of Leaptrot were deliberately made he was bound by them," and failed to qualify this as in said last charge.

4th. This is the first ground in different shape.

5th. Because the Court would not allow Leaptrot to testify as proposed.

6th. Because the jury disregarded the charge as to the value of admissions and verbal declarations hastily and inadvertently made, and put their verdict wholly on said admissions.

This motion was made in duplicate, one was filed and the other was sent to the Judge, who had gone home. So far as can be gathered from the record, the Judge charged as represented in the second clause of the second ground for a new trial, and he *seems* to deny not qualifying the charge set out in the third ground for new trial, as defendant's counsel complains that he did not. He refused a new trial. The bill of exceptions alleges error in all of said particulars. It further alleges as error, that when defendant's counsel read to the Court *seven* requests and asking him to give them in charge to the jury, the Court, without reading them to the jury, held up the paper and said: "Gentlemen, I give you all these in charge, as requested," and passed on to his general charge. He certified to the bill of exceptions as true without a word of comment. But in his written reasons for refusing a new trial, he said: "I know that I gave every request of defendant's counsel in the language requested, except the *eighth*, and may have added, that a man running on or talking at random should not be bound by sayings thus made," and closed with further remarks as to the eighth request.

JOSEPH S. HOOK and R. W. CARSWELL, for plaintiff in error.

A. R. WRIGHT, for defendant.

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WARNER, Judge.

This was an action brought by the plaintiff, as administratrix, against the defendant, to recover the value of twenty-one bales of cotton, alleged to have been converted by him to his own use. On the trial of the case, the jury found a verdict for the plaintiff for the proven value of the cotton. The defendant made a motion for a new trial on several grounds, which was overruled by the Court, and the defendant excepted. The defendant was offered as a witness to rebut and explain his declarations made to certain witnesses who were examined on the trial in regard to the loss of the cotton, but not as to any facts touching the contract for the sale of the cotton made between himself and the intestate. The rejection of the defendant as a witness by the Court, to prove the facts for which he was offered, is assigned as error.

1. This was a suit by the administratrix to recover the value of the cotton on a contract made by her intestate with the defendant, and it was under that contract that she derived her title to the cotton. Where an executor or administrator is a party in any suit on a contract of his testator or intestate, *the other party* shall not be admitted to testify *in his own favor*: Code, 3798. The defendant was offered as a witness to testify in his own favor, in a suit in which the plaintiff, as administratrix, was a party, seeking to recover the value of the cotton on a contract made with her intestate, and the statute excludes him in general terms, in all such cases, from being a witness in his own favor for any purpose. If the defendant could be admitted to testify in his own favor for the purpose, as claimed, why not be allowed to testify in his own favor for other purposes, and thus practically repeal the statute? Where shall the Courts stop in admitting the defendant to testify in his own favor in such cases? The obvious reply is, to stop just where the statute commands them to stop. This question was practically decided in the case of *McIntyre vs. Meldrim*, 40th Georgia Reports, 490. There was no er-

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ror in rejecting the defendant as a witness to testify in his own favor against the plaintiff on the trial of this case.

2. The record discloses the fact that this is the third verdict found in favor of the plaintiff in this case, and we find no errors contained therein that will authorize this Court to set it aside under the evidence, which is quite sufficient to sustain the finding of the jury. The charge of the Court in relation to the admissions of the defendant, when considered as an entire charge, was not such an error as was calculated to mislead the jury, in view of the facts of the case.

3. As a matter of practice, when the counsel for either party reads written requests to charge in the presence and hearing of the jury, the Court should either give or refuse to give such requests in charge. If the request is a legal and pertinent charge which ought to be given to the jury, then the Court should give it in the language of the request, by reading the same to the jury, and not hold up the paper containing the requests to charge, after the same had been read and handed to the Court, and say: "Gentlemen, I give you all these in charge as requested."

The preponderance of the evidence in this case was in favor of the verdict, and we cannot say that it was not right under that evidence. The jury were the proper judges as to the credibility of the witnesses, and the weight to which their testimony was entitled in considering it. The losing party is rarely, if ever, satisfied with the decision of either a Court or jury, when that decision is against him; but the public interest requires that there should be an end of litigation. In view of the facts disclosed by the record in this case, we do not find any sufficient error to authorize this Court to interfere with the verdict, or to control the discretion of the Court below in overruling the motion for a new trial.

Let the judgment of the Court below be affirmed.

Wilborn vs. Whitfield's Executors.

SAMUEL J. WILBORN, plaintiff in error, vs. **M. WHITFIELD'S EXECUTORS**, defendants in error.

1. Whilst it is a general rule of law that a tenant cannot dispute the title of his landlord, yet, when the defendant offers to prove to the Court facts going to show that the defendant was not holding possession of the premises as the tenant of the plaintiff, but under parties having paramount title thereto, the Court should allow the evidence to be received in order to ascertain the truth of the case, and then instruct the jury as to the law of landlord and tenant applicable to the facts as proved in relation thereto.
2. The defendant, Wilborn, was properly rejected as a witness, the other party being dead.
3. Where ejectment is proceeding against one who claims that his children owned the land, and he offered to make them parties defendants, he should have been allowed to do so. (R.)
4. And such party had the right to introduce a will under which the children claimed, and to prove that the premises in dispute were part of the property devised by said will to said children. (R.)

Ejectment. Evidence. Before Judge ROBINSON. Jasper Superior Court. October Term, 1870.

This was ejectment in favor of the executors of Matthew Whitfield against S. J. Wilborn, tenant. The declaration was in the "Jack Jones" form, and had attached to it a copy of a deed to the premises in dispute, made on the 1st of January, 1863, by "James C. and John L. Robinson, trustees of Martha A. Wilborn," to said Whitfield. The suit was begun in 1869. On the trial James C. Robinson testified that his father owned the land in his lifetime, that defendant was in possession when this suit was begun, and showed what it was worth annually for rent. He further testified that Whitfield bought the land in 1863 or 1864, and that he thought defendant rented the land from Whitfield in 1864; that defendant had been in possession of the land since 1858, and Whitfield never was in possession. "It was agreed by all the parties that defendant should take possession;" defendant never claimed the land as his own. Here plaintiffs rested their cause.

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Defendant's counsel moved to make defendant's children, Morgan McAfee in right of his wife, Mary J. McAfee, S. C. Wilborn, individually, and as guardian *ad litem* for L. C. and W. H. Wilborn, defendants. This was refused.

They then offered to show by defendant that John Robinson, grandfather of those sought to be made defendants, was seized and possessed of said land for forty years before his death in 1857, as of his own property; that, by his will, duly proven, he devised said land to said parties sought to be made defendants; that they never conveyed the same, but ever since his death had been in possession thereof by himself as their tenant, and that he never held as Whitfield's tenant.

He was rejected as incompetent because Whitfield was dead. Defendant's counsel then offered to show the same outstanding title by said James C. Robinson, but the Court rejected the evidence. They then offered in evidence a copy of the proven will of Robinson, deceased, for the same purpose. No realty was devised by the will, unless the residuary clause included land. One-fourth of the *residuum* was devised to James C. and John L. Robinson, in trust for the children of his daughter, Martha A. Wilborn, who we suppose was defendant's wife. The will was rejected.

The Court charged the jury that plaintiffs must recover, if at all, upon the strength of their title, and not upon the weakness of defendant's title; that "two months' notice is necessary from the landlord to terminate a tenancy at will; one months' notice is necessary from tenant."

The jury found for the plaintiffs the premises in dispute, with mesne profits. Defendant's counsel moved for a new trial, alleging that the Court erred in refusing to allow said parties to be made defendants; in holding defendant an incompetent witness; in rejecting the will and the witness to prove what they sought to show by defendant; because the verdict was contrary to the charge of the Court, against law and without evidence to support it, and because said copy

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deed went to the jury with the declaration, though no deed was put in evidence by the plaintiff. The new trial was refused and that is assigned as error.

KEY & PRESTON, for plaintiff in error.

WILLIAM A. LOFTON, for defendants.

WARNER, Judge.

This was an action brought by the executors of Whitfield against the defendant, under the statute, to recover the possession of a tract of land in Jasper county. The plaintiff proved that the defendant was in possession of the land, and that he rented it from Whitfield in the year 1864; also proved the value of the yearly rent of the land, and that the premises in dispute was a part of the land which witness' father, Robinson, owned in his lifetime. On cross-examination, the plaintiff's witness stated that the defendant went into possession of the land in 1858, and had been in possession of it ever since; that Whitfield was never in possession of the land; that defendant never claimed the land as his own; that it was generally agreed by all the parties that the defendant should take possession of the land. After the plaintiff had closed his evidence the defendant made a motion to make McAfee and others, who were the devisees of the land in dispute under the will of John Robinson, parties defendant for the purpose of laying the foundation for the introduction of evidence to show a paramount title to the land in them, and to prove that the defendant went into the possession of the land as *their tenant*, which motion the Court overruled, and the defendant excepted. The defendant then introduced himself as a witness, and offered to prove that he was not a tenant of Whitfield, but was the tenant of the persons claiming under the will of John Robinson, who were sought to be made parties defendant; that John Robinson had been seized and possessed of the land for

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forty years prior to his death in 1857. This witness was rejected by the Court on the ground that plaintiff's testator was dead, and the defendant excepted. The defendant offered in evidence a certified copy of the will of John Robinson for the purpose of showing title to the land in McAfee and others, which the Court rejected, and the defendant excepted. The defendant offered to prove by James Robinson, the plaintiff's witness, the same facts which he attempted to prove by the defendant who had been rejected, which the Court refused to allow him to do, whereupon the defendant excepted. The jury found a verdict for the plaintiff, and the defendant made a motion for a new trial, assigning as grounds therefor the rulings of the Court as hereinbefore stated, which motion was overruled. Whilst we recognize the general rule of law that a tenant cannot dispute the title of his landlord, yet, under the statement of facts disclosed by the record in this case, we think the Court should have allowed the parties to have been made as proposed by the defendant, received the will of John Robinson in evidence, and also should have received evidence as to the identity of the land mentioned in the will, and evidence as to whether the defendant was in fact the tenant of the parties claiming under the will, or whether he was in possession of the land as the tenant of Whitfield, so as to have ascertained from the evidence what were the rights of the respective parties. And then the Court should have charged the jury as to the law applicable to landlord and tenant, and left the jury to find the facts under the evidence. There was no error in the rejection of the defendant Wilborn as a witness, the other party being dead. See *Administratrix of Robertson vs. Leaptrot*, decided at this term of Court. But we are satisfied this case has not been fairly tried on its merits from the statement of facts disclosed by the record, and therefore order a new trial.

Let the judgment of the Court below be reversed.

Dart *vs.* Dupree.

U. DART, Jr., plaintiff in error, *vs.* S. T. DUPREE, defendant in error.

When the evidence is conflicting and no rule of law violated in submitting the facts to the jury which probably might have produced a different result, a new trial will not be granted on the ground that the verdict is contrary to the evidence, the more especially when the presiding Judge is satisfied with the verdict.

New Trial. Before Judge SESSIONS. Glynn Superior Court. November Term, 1870.

Dupree sued U. Dart, Jr., upon an account for work and labor from the 15th of March, 1865, to the 1st of March, 1866, at \$3 00 per day, on which he gave credit "by cash and note, \$105 00, and lost time, \$18 00." That he did the work and labor was not disputed. The evidence as to its value ranged from \$1 00 to \$3 00 per day.

The defense was that plaintiff worked for his board and clothing; that he worked for defendant's father, and that the father paid him said "note and cash, \$105 00," which was all his work and labor was worth. It was shown that plaintiff was boarded and clothed and got said note and cash; and defendant paid him; but as to whether he employed him and paid him as agent for his father or upon his own account, the evidence was conflicting.

The Court charged the jury that if the credit was given to defendant exclusively, they should find for plaintiff.

The jury deducted the amount paid, the value of the board and clothing, and gave a verdict for plaintiff for \$118 00. Defendant moved for a new trial upon the grounds that said verdict was contrary to law and the charge of the Court, and unsupported by the evidence. The Court refused a new trial. That is assigned as error.

HARRIS & DAVENPORT, by Judge COLLIER, for plaintiff in error.

Zeigler vs. Beasley.

HARRIS & WILLIAMS, for defendant.

WARNER, Judge.

This was an action brought by the plaintiff against the defendant on an open account for wages. The jury, on the trial, found a verdict in favor of the plaintiff for the sum of \$118 00. A motion was made for a new trial on the ground, that the verdict was contrary to law, contrary to the charge of the Court, and contrary to the evidence and the weight of the evidence. The Court overruled the motion, and the defendant excepted. The evidence was conflicting, and the jury were the proper judges as to the credibility of the testimony of the witness, and the weight to which it was entitled in view of their interest and relation to the parties. In such cases, the uniform ruling of this Court has been not to interfere with the verdict where no rule of law has been violated in submitting the facts to the jury, which probably might have produced a different result, the more especially when the presiding Judge, who tried the cause, is satisfied with the verdict. We find no error in this record which will authorize this Court to set aside the verdict and grant a new trial.

Let the judgment of the Court below be affirmed.

S. ZEIGLER *et al.*, plaintiffs in error, vs. THOMAS H. BEASLEY, defendant in error.

When a bill was filed to restrain the transfer of certain promissory notes, alleged to have been given for the purchase of a tract of land, the main inducement for the purchase thereof being the timber standing on the land at the time of the sale, which the vendor had previously sold to other parties without the knowledge of the vendee, and the notes given for the land being due at different times :

Held, That a Court of equity had jurisdiction, under the allegations in the complainant's bill, to restrain, by injunction, the transfer of the notes

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by the vendor, which were not due at the time of the filing of the bill, until the final hearing of the cause, to prevent a multiplicity of suits, and to have the whole matter in controversy between the parties settled by the decree of the Court.

Equity. Injunction. Before Judge SESSIONS. Appling county. September, 1871.

Beasley's bill against Zeigler *et al.*, made this case: In April, 1870, he bought from them certain lands containing say, twenty-two hundred and sixty acres, with all its appurtenances, without reservation or exception, for \$2,500 00. He paid \$625 00 cash, afterward, and gave his three notes to them for \$625 00 each, dated the 22d of October, 1870, and due at six, twelve and eighteen months thereafter, took their deed and gave them a mortgage on the land to secure the said notes. The land was well timbered, the timber was worth \$1,718 00, and the land worth but little.

Previous to said sale, on the 2d of February, 1869, and without Beasley's knowledge, defendants had conveyed to Hall & Miller the timber on seventeen hundred and fifty-nine acres of said land. They have sued Beasley on the first note which is due. They still hold the others and the mortgage. They refuse to turn over to him the proceeds of the sale of the timber, or to make any deduction on said notes, but insist that he shall pay them. He prayed that their suit be enjoined, that they be enjoined from transferring the other notes and mortgage, and that an equitable settlement be decreed.

The injunction was granted. Defendant demurred to this bill, upon the grounds that it contained no equity, plaintiff had adequate remedy at law, and the injunction was improvidently granted. The Chancellor overruled the demurrer, and that is assigned as error.

P. W. MELDRIM, for plaintiffs in error.

J. C. NICHOLS, by Z. D. HARRISON, for defendant.

Murray vs. Walker.

WARNER, Judge.

This was a bill filed by the complainant against the defendant, on the 3d of October, 1871, praying for an injunction to restrain the collection of a note then in suit, and to restrain the transfer of two other notes not then due, which the complainant had given to the defendants for the purchase of a tract of land. It averred that the chief value of said tract of land was the timber then standing on it, which was the main inducement in making the purchase thereof; that prior to the sale of the land to the complainant, the defendants had sold the timber on the land to other parties without his knowledge. The injunction was granted, and the bill was demurred to for want of equity, inasmuch as the complainant had an adequate and complete remedy at law. The Court overruled the demurrer, and retained the injunction. Whereupon the defendants excepted.

In view of the facts disclosed by the record, there was no error in the judgment of the Court below. The bill and injunction were properly retained on two grounds. First, for the purpose of restraining the transfer of the two notes not due at the time of filing the bill. Second, to prevent a multiplicity of suits on the several notes given for the land, as the same became due, so as to have the whole matter in controversy between the parties, in relation to the sale of the land, settled by the decree on the final hearing of the bill.

Let the judgment of the Court below be affirmed.

ALEXANDER MURRAY, plaintiff in error, vs. WILLIAM WALKER, defendant in error.

1. An agent for the collection of a note may not, without instructions so to do, receive any other than good currency in payment thereof. (R.)
2. But if the agent received Confederate currency in payment of his principal's note without authority, and his principal accepted the same from him:

Murray vs. Walker.

Held, That the taking of the Confederate currency by the principal and its use by him was a ratification of the act of his agent.

3. The verdict of the jury was sustained by the evidence, and no rule of law being violated in submitting the case, it was error in the Court below to grant a new trial.

This cause is reported in the opinion.

WELBORN & FAIN; H. P. BELL, for plaintiff in error.

GEORGE D. RICE, for defendant.

LOCHRANE, Chief Justice.

This was a bill filed by the plaintiff in error for specific performance, under the following statement of facts: Murray exchanged with Walker certain lands in Union county, on the 20th day of October, 1860, and gave him four notes, difference in the trade, for \$100 00 each, falling due annually thereafter. In 1863 the agent of Murray paid off, in Confederate currency, the two last notes mentioned to the brother of Walker, who received the money and sent it to William Walker, the owner, which he received and used. This bill was filed by Murray to compel Walker to execute to him a deed for the land taken in exchange. Upon the trial the jury found in favor of Murray, decreeing that titles should be made to him for the lands in question. A motion for a new trial was made by the defendant to the bill, upon the grounds that the verdict was contrary to the law, the evidence and the charge of the Court, which the Court granted, and this judgment, granting the new trial, is the error which we are called upon to review. We may say, in passing, that, inasmuch as the record does not disclose what the charge of the Court was which is complained of, that question will not be considered by us; to invoke the decision of this Court it was requisite the charge should have been specifically stated, 28 Georgia, 186.

It appears from the record that Murray was in possession

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of the land under the original contract, and that he had paid the notes given for the purchase-money, and he would be therefore entitled to a specific performance under the rules laid down by this Court in 20 Georgia, 142. The defense, however, and main ground in this controversy arises out of the payment of Confederate currency by the agent of Murray to the agent of Walker. Confederate money received by the party or accepted by him operates as a legal payment, and extinguishment of the debt, but in this case the weight of the evidence shows that the agent of Walker acted without his authority in receiving Confederate currency.

1. And a special agent holding a note deposited for collection would not be authorized without instructions to receive any other than good currency in payment thereof.

2. But from an examination of the record in this case, it appears that Walker received the money and paid off a portion of it in extinguishment of a debt due by himself, and the balance of it he spent. There was no attempt to return the money either to Murray or to his own agent, and the receipt of the money with the fact of its being used by him constituted a ratification, and which ratification, upon his part, under section 2166 of the Code, estops him from asserting the want of authority originally in his agent, and is as binding upon him as if he had himself, in fact, consummated the act. And the jury were the proper judges of the evidence, and there was evidence sufficient to sustain their verdict.

3. And no rule of law having been violated in submitting the facts to their consideration, we are of opinion, under the established rules of this Court, that their verdict ought not to have been set aside, and we therefore hold that the Court below erred in granting a new trial under the law and the facts in this case.

Judgment reversed.

Kilgo *et al.* vs. VanDyke.

SARAH E. KILGO *et al.*, plaintiffs in error, vs. M. H. VAN DYKE, defendant in error.

A and B entered into a contract of partnership, by which A was to furnish goods to B, who was to sell, them, and, after the first cost of the goods were paid, the profits were to be equally divided; and, after B's death, A filed his bill against his widow and heirs, to recover the balance he claims due to him, and set up that, inasmuch as B, during the copartnership, had used funds arising therefrom in improvements, etc., on certain property, which the widow had set off as a homestead under the laws of the State, his debt had a lien thereon.

A demurrer was filed to the bill, which was overruled by the Court:

Held, that the Court erred in overruling the demurrer, as the debt due by B in his lifetime to A constituted no lien on his property that would deprive the widow of her right to homestead as against his creditors therein, nor was the use of such funds, under the facts, within the exceptions in said Act, for money borrowed, labor done, or material furnished, etc., and that the claim of A against the estate of B was of not higher dignity or of more equitable consideration than other debts due by him, and that his remedy is complete at law, and the administrator on the estate of B is a necessary party to the enforcement of such ordinary debts against the estate.

Lien. Homestead. Before Judge KNIGHT. Lumpkin Superior Court. April Term, 1871.

In September, 1866, VanDyke agreed to deliver to Kilgo goods to be sold by Kilgo for him. Kilgo agreed to receive them into his store and sell them, and after paying Van Dyke original costs they were to divide the goods on hand and accounts between them. At that time Kilgo owned the store and his dwelling adjoining it, and a farm. VanDyke furnished him \$15,000 00 worth of goods. Kilgo sold part of them, and with part of the proceeds had his house repaired by painting, etc., and paid his physician's bills, etc. In February, 1870, Kilgo died, leaving his widow and several minor children, him surviving. Her books showed a balance due VanDyke of say \$800 00, and Mrs. Kilgo agreed that this balance was due on said partnership account. She, as head of the family, refused to pay it, but has had the store,

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dwelling and farm, all set apart as a homestead for herself and family. No administration has been taken on Kilgo's estate. Upon this statement of facts in his bill, VanDyke claimed a lien for said \$800 00 on said homestead, and prayed that the homestead be subjected to its payment.

This bill was demurred to for want of equity. The demurrer was overruled and that is assigned as error.

H. P. BELL; R. N. QUILLIAN, for plaintiff in error, relied on 40 Ga. R., 439.

JOHN A. WIMPEY; J. N. DORSEY, for defendant. Van Dyke has lien: Story's Eq., J., sec. 1237, 1239. No provision in Code for enforcing this lien: See Code as to liens. Equity and law jurisdiction concurrent. Code, sec. 3041; 40 Ga. R., 442. The Court will protect the minors: Code, secs. 1772, 4133.

LOCHRANE, Chief Justice.

This bill was filed by a copartner against the widow and minor children of a deceased copartner, to recover a balance due on account, and to subject property set apart for a homestead, to the claim. The Court overruled a demurrer filed to the bill, and we reverse the judgment overruling the demurrer, for the reason: 1st, That it was necessary to make the administrator a party, whose right of defense to the claim and settlement of the copartnership transactions between the complainant and his decedent, is a matter of legal duty devolved upon him by the law. 2d. We are of opinion, upon the facts stated by the bill and admitted by the demurrer, that complainant's claim is clothed with no right in equity to interpose and deprive the widow of her right of homestead in the estate left by her deceased husband; for the uses of the funds, as alleged by the copartner in his lifetime, does not bring the claim within the exceptions of the Act. It was neither money borrowed, labor done, nor material fur-

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nished, etc., thereon, and we are therefore of the opinion, and so adjudge, that the judgment of the Court below be reversed. Judgment reversed.

GILBERT & VASON, plaintiffs in error, *vs.* SEYMOUR, JOHNSON & COMPANY, defendants in error.

The defendants were sued as drawers and indorsers on a draft not payable at a chartered bank. Two questions were made and decided by the Court below, as appears from the bill of exceptions: First, whether the defendants were entitled to notice to make them liable as indorsers. Second, whether the defendants were discharged, as indorsers of the paper, by the failure of the holders thereof to give reasonable notice of the non-payment of the draft by Moughon, the drawee. The Court decided that notice was not necessary to charge the defendants as indorsers, to which decision the defendants excepted. Under the provisions of the Revised Code of this State, the indorsers of a bill or note, not to be negotiated at a chartered bank, are not entitled to notice of non-payment, or non-acceptance, to charge them as indorsers: Code, 2739. In our judgment, there was no error in the decision of the Court below in overruling the motion for a new trial on either of the grounds stated in the bill of exceptions.

Drafts. Notice of non-payment. Before H. MORGAN, by consent, Judge *pro hac vice*. Dougherty Superior Court. February, 1871.

Seymour, Johnson & Company brought "complaint" against Gilbert & Vason, on a draft in these words:

"ALBANY, GA., March 16, 1867.

"At sight pay to the order of ourselves, two hundred and five dollars and fifty-five cents, value received, and charge the same to account of GILBERT & VASON.

"To WILLIAM S. MOUGHON, Macon, Ga.

"(Indorsed) 'Pay to the order of SEYMOUR, JOHNSON & Co.'"

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The defendants pleaded payment. Plaintiffs read in evidence the draft, and closed. Defendants moved for a non-suit, because there was no proof of demand on Moughon, nor of notice to defendants of such demand, and Moughon's refusal to pay the draft. The motion for non-suit was overruled. Vason testified that Vason & Davis owed plaintiffs \$450 00, and in March, 1867, Johnson called for payment; they offered him the whole of the money, but he preferred said draft and the balance in cash, and they settled with him in that way, and gave Moughon credit by the amount of the draft; Moughon then owed defendants say, \$500 00, was in possession of land worth \$50,000 00, and considered solvent. He had promptly paid his bills, and defendants had no notice that he had not paid this draft till the fall of 1867, or the winter of 1867-8. Then Moughon was insolvent. The jury found for the plaintiffs for the amount of the draft and costs. The defendants moved for a new trial, upon the grounds that the Court erred in not non-suiting plaintiffs, and because the verdict was contrary to law, etc., and because plaintiffs' *laches* discharged defendants. The new trial was refused, and that is assigned as error.

VASON & DAVIS, for plaintiffs in error.

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WILLIAM E. SMITH, for defendant.

LOCHRANE, Chief Justice.

The controlling question in this case, presented by the record, is, whether, under the facts, plaintiffs in error were entitled to notice of the non-payment of the draft made and indorsed by them on Moughon. We have held that the Code, section 2739, applied to indorsers, and to papers intended for negotiation at a chartered bank, and that parties to notes or drafts other than indorsers, and not included in the terms of the Code, were still entitled to the notice under the rules of law, required to be given to charge them with lia-

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bility. In this case, the anomaly of the relation borne by Gilbert & Vason to the draft on Moughon, presents the difficulty of the application of the legal principles involved. In the first place, they were drawers of the draft, made *payable to themselves*, and it was by them indorsed over to Seymour, Johnson & Company. The paper was not intended for negotiation at a chartered bank, and as such indorsers, they were not entitled to notice. Were the same parties, as drawers, entitled to notice? If distinct and independent parties, I think they were; but as the paper, taken together with the circumstances at the time, is to be regarded as one transaction, and in the light of one' broad liability, we do not think the Court erred in holding that they were bound by the indorsement in the absence of notice of the non-payment of the draft by Moughon, and, consequently, that the Court decided correctly in refusing a new trial, under the law and facts of the case.

Judgment affirmed.

H. CRUTCHFIELD, administrator, plaintiff in error, *vs.*
GEORGE PATTEN *et al.*, defendants in error.

The plaintiff in error in this case filed his answer, in which he set up, by way of cross-bill, that a certain sum of money found to be due by the auditor to parties therein named, as daughters of the decedent, was correct as to the facts set out in such report, and admitted the trust and the rights of the parties, but alleged that such amount ought not to be paid, upon the ground that their husband's marital rights attached thereto, and that they had, by waste and mismanagement of the estate, rendered themselves liable for a larger amount to the estate, and the Court below dismissed the cross-bill upon motion: *Held*, that the right at any time before a final decree distributing the assets to file a bill setting up grounds of equity against the payment of certain debts is recognized by this Court, and if the subject matter has been previously litigated or adjudicated before the Auditor upon the facts, and by the Court upon exceptions to his report, relative to the law, and the interlocutory judgment of the Court has confirmed the

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report, such facts must arise upon plea to the cross-bill, and it was error in the Court to dismiss the same upon motion.

Equity. Parties. *Res adjudicata*. Tried before Judge ONEAL. Mitchell Superior Court. June, 1871.

In December, 1861, Neal obtained two judgments against Allen Cochran. Cochran died in 1863, and Jubal Cochran became his executor, and by his consent Polhill, the son-in-law of Allen Cochran, took possession of part of the estate and managed it. In 1866, Neal filed a bill against Polhill, Jubal Cochran, etc., to cause the assets of the estate to be preserved by placing them in the hands of a Receiver for the benefit of Neal and the other creditors, with a prayer that their respective priorities be established, etc.

In November, 1866, a Receiver was appointed and ordered to convert the property into cash. This was done. Jubal Cochran died and H. Crutchfield was appointed administrator *de bonis non* of Allen Cochran. And an Auditor was appointed and all claimants ordered to present and prove their claims before him. The claims were afterwards submitted to an Auditor and he made a report thereon. This report was recommitted to him "with the usual powers of a Master in Chancery," to hear and report upon any claims that may have been or may be presented against the estate and not yet reported upon, and especially to hear evidence and ascertain the amount of the claims of Mary Polhill and Medora Wade, claimed to be fiduciary debts, due by them to their father as their guardian, (and which they prayed should be settled on them,) and to pass upon their priority over all other debts, all to be heard at a time and place to be by him appointed, of which he should give notice.

Notice was given, a hearing was had before the Master in Chancery, and in April, 1869, he reported that the assets should be paid out in the following order: 1st. To Mrs. Polhill and Mrs. Wade; 2d, the three judgments of Garnett Andrews; 3d, the judgment of Ewell Webb, and 4th,

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that of John W. Dent, all obtained in 1860. This Webb *fi. fa.* was founded on money loaned by the trustee of Melinda Zeigler to Allen Cochran and Crutchfield, procured Webb to sue it to judgment, and he subsequently transferred it to Crutchfield.

Crutchfield, as administrator, was, by his attorneys, present before the Master in Chancery. When this report was filed various exceptions were filed thereto by attorneys for Crutchfield, administrator *et al.*, among which was a suggestion that Mrs. Polhill and Mrs. Wade were chargeable with the waste of said estate by their respective husbands, but this matter was not considered by the Master in Chancery.

At November Term, 1870, Melinda Zeigler represented that she had just become of age, had for years resided in Ohio, was interested in said fund, being the real owner of the Webb *fi. fa.*, and prayed to be made a party to said record. The order was granted. At the same time, after all this, the said exceptions were withdrawn and the report was ordered to be confirmed. At the same term there was a motion to set aside said finding of the Master, which is still pending in favor of Crutchfield, administrator, so far as appears. (But part of the record being here, this and other statements herein may not be accurately correct.)

The Court, in May, 1871, dismissed the claims of Melinda Zeigler *et al.* against said fund, because their claims were founded on contracts made prior to June, 1865, and the claimants had not filed affidavits that all legal taxes had been paid, as is required by the Relief Act of the 13th of October, 1870. Crutchfield, as administrator *de bonis non*, had answered Neal's bill, at May Term, 1871, in which, by way of cross-bill, he set forth the facts touching Mrs. Slaughter's claim by way of resisting her claim. (For these facts, see *Slaughter vs. Culpepper*, *ante*, at this term.) He also, at large, charged all the facts showing that, while Polhill was so in charge of the property of the estate he and Wade used a larger amount of it than Allen Cochran owed his daugh-

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ters, their wives, whom they married before 1866. And he claimed that this claim of the wives vested in their respective husbands, and should therefore be set-off by said waste. Further, he set forth the facts as to Patten's purchase of cotton from Polhill, (see *Neal vs. Patten*, 40 Georgia Reports,) and prayed that the proceeds of that cotton be paid to him as the administrator, for distribution. These two last claims were based on averments that Polhill, Wade and Patten were insolvent. He did not attack the *amount* found to be due Mrs. Polhill and Mrs. Wade, but said that amount should offset as aforesaid by such waste, and that though a party as administrator he had never answered the bill, it had never been taken *pro confesso* as to him, and therefore he was not concluded. His object now was to get possession of all the assets to pay out according to law.

Further, in answer to the claim of Melinda Zeigler, he answered that she had resided in Ohio, and was just of age, as she averred; that the Webb *fi. fa.* was hers; that William Zeigler, by his will, left \$30,000 00 to a trustee for her; that he, Crutchfield, assumed this trust in 1859, and received the trust funds from his predecessor, amongst which was the note on Cochran, on which said Webb *fi. fa.* is founded. He had it sued in Webb's name, but in fact it was his as trustee for Melinda Zeigler, and he ever held it in that capacity only till her maturity, and then surrendered it to her. He prayed that her priority of claim on said fund be fixed by a decree.

Upon motion, the Chancellor dismissed all of this cross-bill because it was multifarious and an effort to revive indirectly the former judgments of the Court by which Crutchfield was concluded.

This is assigned as error.

LYON DEGRAFFENREID & IRVIN; VASON & DAVIS,
for plaintiff in error.

JAMES L. SEWARD; WRIGHT & WARREN; A. D. HAM-
MOND; JOHN RUTHERFORD, for defendants.

LOCHRANE, Chief Justice.

It appears from the facts in this case that a certain controversy was pending in the Court below in relation to the distribution of the assets of the estate of Allen Cochran, deceased. During the progress of the litigation certain matters were submitted to an Auditor, before whom the parties appeared, and whose report was made the judgment of the Court. Exceptions filed to the report were adjudged invalid, and the report of the Auditor was made the judgment of the Court, by which two daughters of the decedent, both being in life and married, were held to be entitled to a trust debt due by the decedent, their father, to the amount of some \$7,000 00. The present case originates in the answer of Crutchfield, who, as administrator of the estate, and thereby representing all the parties, creditors at interest, and who sets up in such answer, by way of cross-bill, that, admitting the said daughters to be the children of Allen Cochran, and the amount due them reported by the Auditor correct, still their husbands, by their marital rights, were the owners of such estate inherited by their wives, and that such husbands had, by mismanagement and waste of the estate, rendered themselves liable to an amount of indebtedness greater than that which had been awarded, and the Court dismissed such cross-bill upon motion in the nature of demurrer thereto.

The main question is, whether the judgment of the Court in dismissing the bill under the facts was conformable to law. It is admitted that this administrator was a party to the original litigation, first, as the transferee of an execution, and also as administrator, and either by himself or counsel participated therein, and that the claims which he now sets up have their existence in matters known to him in his capacities as aforesaid. We are satisfied from this record and by the allegations of his bill, that the questions raised upon motion were not sufficient to have authorized the dismissal of the bill. It was for all purposes a cross-bill, and set up new

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matters not passed upon or legitimately within the scope and power of an Auditor or Master in Chancery ; and the Court erred in dismissing it, and should have held that, inasmuch as the bill admitted all the report accomplished, the parties defendant thereto should have pleaded the previous litigation and set up in defense or estoppel thereto the questions of adjudication argued before this Court. As to how far the possession of the husband, as the agent of the executor, was a reduction to possession of the wife's equitable interest, is a matter well settled by the adjudication of this Court, but it is not for us to decide upon the pleadings. The question is, has the administrator of an estate the right to set up, by way of cross-bill, new equities before final decree distributing the assets, after the report of an Auditor, confirmed by a judgment of the Court, dismissing his case without proper pleadings setting up the matters litigated or adjudicated in estoppel? After consideration, we are satisfied that he had not. For, under the law, the Chancellor had to take the allegations of the bill as true, upon the motion to dismiss. And when the bill set up the report of the Auditor, and admitted its force as to the amount found to be due, but charged that the fund was the property of the husbands, and that they, by *waste* or mismanagement of the estate, had rendered themselves liable to a greater amount, etc., then this ground of equity could not be summarily disposed of by dismissal of the bill, but it invoked the defense to be set up by plea if the facts of the original litigation had previously covered this question, and the Court, upon such pleading, should have pronounced his judgment. For *laches* or delay by the administrator, was not in itself sufficient, nor was there such *decree* in the premises as operated as an estoppel, and the facts upon which the right of the defendants depended had to be pleaded to invoke the judgment of the Court, if by them it appeared that the subject matter of the cross-bill had been in fact adjudicated.

Judgment reversed.

WILLIAM H. BREWER, plaintiff in error, vs. WILEY JONES,
defendant in error.

When, by mistake of a magistrate in failing to mark the name of counsel to the defense of a suit pending in his Court, judgment was obtained against the defendant, and such defendant, under a mistake and ignorance of the facts, let the time elapse for appeals, and filed his bill, stating the facts of the mistake, and also that he was not liable for the debt sued, it being, as he alleges, a promise to pay the debt of another under conditions, which is denied by the defendant to the bill, and upon hearing the evidence the Court refused the injunction:

Held, That the Court erred under the facts alleged in the bill. The judgment having been obtained by mistake, equity had jurisdiction, and the fact of the liability was a question for the jury upon the evidence, and it was the duty of the Court to have restrained the levy under such judgment, until the hearing upon all the facts and evidence in the case.

Mistake. Tried before Judge CLARK. Sumter county.
Chambers. September, 1871.

This was a bill for injunction under this statement of alleged facts: Jones sued Brewer for Amos' board, for which Brewer was not liable, for reasons specified. Brewer employed an attorney to defend the suit, and told the Justice of the Peace, before whom the suit was pending, who his attorney was, and asked him to mark his name upon the docket. This was the usual way of pleading in said Court. Brewer's attorney was going away, and sent to the Justice for leave of absence, which he granted. By mistake, however, the Justice had marked Brewer's attorney for the plaintiff, which was not known to Brewer or his attorney.

Mr. Lumpkin was plaintiff's counsel, and when the cause was called, though he knew Brewer's attorney had leave of absence, took a judgment, not knowing that the cause was to be defended. *Fi. fa.* has issued and been levied upon Brewer's property. The Chancellor ordered Jones to show cause why the injunction should not be granted. He answered, claiming that Brewer was liable for said board, denying his

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defense to the action, and denying that his attorney had any leave of absence from the Court.

At the hearing, affidavits were read in support of the respective sides. By an affidavit of the Justice, it appeared that though the attorney's messenger had not gotten leave of absence, the Justice knew that the attorney had gone to marry, and would not have taken up the case had he not, by mistake, marked his name for plaintiff, and supposed the case was in default. The attorney swore that he supposed his name was properly marked, and that he had leave of absence, and did not find out that judgment had been entered till it was too late to appeal. There were affidavits as to the merits of the defense, but they are useless here. The Chancellor refused the injunction, and that is assigned as error.

J. A. ANSLEY, by the REPORTER, for plaintiff in error.

S. LUMPKIN; JACK BROWN, for defendant.

LOCHRANE, Chief Justice.

It appears from the facts in this case that the magistrate failed to mark counsel's name to a case pending before him, and owing to the mistake a judgment was entered up. The defendant being ignorant of what transpired, permitted the time for entering an appeal to elapse, and this bill was filed to restrain the levy under the judgment. The Court below refused the injunction, and that is the ground of error assigned. By this bill the facts going to show the mistake made by the magistrate are detailed, and also the merits of the case presented, by which the complainant avers that he was not liable for the debt; that it was a conditional promise to pay the debt of a third party, and the conditions had not been carried out. The answer of the defendant denies the conditions set out in the bill.

We think, under all the facts of this case, that the Court

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erred in refusing an injunction. The main ground we put it on is the mistake by which the judgment was obtained. Equity has jurisdiction over matters of mistake, and we think the detail of facts in the bill made out a case for equitable interposition until the hearing could be had on the evidence in the case. As to the merits, we do not now entertain that question further than to say the fact of liability was a question for the jury, and we reverse the judgment of the Court below, to let the parties have a hearing upon all the facts and evidence in the case.

Judgment reversed.

WILLIAM A. RAWSON, plaintiff in error, vs. POINDEXTER
CHERRY, defendant in error.

1. On the trial of an issue joined to ascertain whether the defendant was in possession of the land for which the note, the foundation of the action, was given at the commencement of the suit, the death of one of the parties to the note, the survivor being the one to whom the deed was made, did not exclude the plaintiff as a witness from testifying, and it was error in the Court to reject his evidence.
2. When a deed was made to Cherry at the time of the sale of the land, and which he still holds, we are of opinion that, by the operation of law under such deed, he had the possession of the lands, either by himself or tenants, and the jury found against the evidence in finding the contrary, and the Judge erred in dismissing the case upon such verdict for non-payment of taxes under the Act of 1870.

Relief Act of 1870. Possession of land. Before Judge HARRELL. Stewart Superior Court. April Term, 1871.

Rawson brought suit in August, 1866, upon a promissory note made in 1861 against Cherry alone, as security. He had filed no affidavit of the payment of taxes under the Relief Act of 13th of October, 1870, averring that it was unnecessary, because the note was for the purchase-money of land of which Cherry was in possession at the commencement of this

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suit. The Court directed a trial to ascertain whether that were so.

The note was made by one Day, and Cherry was but his security. Day was dead. Rawson was offered as a witness, but the Court would not allow him to testify because Day was dead. Cherry testified that he knew of Day's buying a place from Rawson, and giving such note in part payment, and that Rawson made the deed to him, Cherry, who stood Day's security; that he rented the land to Burke in 1870 and 1871; that he let Adams occupy it in 1868 and 1869, rent free; that Day died in the army, and Mrs. Day remained in possession in 1865 and part of 1866, but when she left he did not know; that she left before August, 1866, went out of her own accord, and was not his tenant, he did not put her in possession. The jury found that Cherry was not in possession when the suit was begun, and thereupon the Court dismissed the cause for want of said affidavit as to taxes. Plaintiff's counsel moved to set aside the order, because the Court erred in refusing to let Rawson testify, because the verdict was contrary to law and the evidence, and because the dismissal was wrong, because the Relief Act of 1870, as applied to prior debts, was unconstitutional. The Court refused to set aside the dismissal, and that is assigned as error.

B. S. WORRILL; J. L. WIMBERLY, for plaintiff in error.
Rawson was competent: R. Code, sec. 3798; 38 Ga. R., 103.

E. H. BEALL; M. GILLES, for defendant.

LOCHRANE, Chief Justice.

This case arises upon a motion to set aside the order of the Judge dismissing the case. It appears from the record that William A. Rawson had sued Cherry, the defendant in error, upon a note for \$2,336 29, dated October, 1861, and signed by J. J. Day and the said Cherry, as security. Upon the trial of this case it became a question before the Court

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whether Cherry, the party sued, was in possession of the property for which the note was given at the commencement of the action. And upon the trial of such issue the jury was impaneled and the grounds taken in the motion to vacate the order of dismissal transpired, and were alleged as errors.

1. The first question of exception upon the trial of such issue was the rejection of the testimony of William A. Rawson, and declaring him to be an incompetent witness to prove the facts springing out of the transaction, because Day, one of the makers of the note, was dead. Under the exceptions to section 3798 of the Code of this State, it is contended that Rawson is an incompetent witness. In this we think the Court erred, as neither by the terms of that Act nor under the facts in this case in a suit against Cherry would Rawson be held incompetent to give in evidence, the facts growing out of the transaction relative to him. And in 38th Georgia, page 103, this Court held where a contract was made with a surviving co-partner, the party was permitted to give in evidence the facts of the transaction, although in such case one of the partners and parties thereto was dead. But upon this issue as to whether Cherry, the defendant, was in possession of the land sold at the institution of the suit, Rawson was clearly competent, and his testimony entitled to be received by the Court, and we hold the Court erred in rejecting it.

2. The evidence in the case shows that the deed was made to Cherry, and that this note was given for the purchase-money; and that Cherry holds the deed now, and is in possession of the land. It also shows that soon after the purchase, Day went into the army, where he died, and his widow remained upon the place a short time, when she left. And Cherry swears that she was not his tenant, and that he was not in possession of the land on the 13th of August, 1866, the commencement of the suit. The jury found that the defendant was not in possession at the commencement of the action. Upon which finding, as Rawson had not filed his

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affidavit, under the Act of 1870, the Judge dismissed his case for the non-payment of taxes.

In the view we take of this case, we are satisfied first, that the execution of the deed to these lands, made by Rawson to Cherry in 1861, invested him with the title thereto and the right of possession; and that all parties, from that date to the date of the trial, whether they paid him rent or not, were in fact his tenants; and upon the trial of this issue, the jury found contrary to the evidence and against the weight of the evidence. And irrespective of Rawson's testimony, which ought to have been admitted, the facts demonstrate that Cherry was the legal owner of the property, holding title thereto; and the jury ought to have found, upon the facts and the law, that he was in legal possession of the land for which the note was given, at the commencement of the suit. And we, therefore, hold, the Court erred in dismissing the plaintiff's action, upon the ground the taxes had not been paid, inasmuch as under the law, no taxes were due.

Judgment reversed.

MICHAEL GORMLEY, Ordinary, plaintiff in error, *vs.* JOSEPH H. TAYLOR, defendant in error.

1. When the Constitution creates an office to be filled by appointment of the Governor, by the advice and with the consent of the Senate, but legislation is necessary to carry the Constitution into effect, and an Act for that purpose is passed, which, by its express terms, does not take effect until a day subsequent to the adjournment of the Senate, the office is vacant, and may be filled by the Governor, until it is filled permanently, as provided by the Constitution. It is immaterial whether the office has "become vacant;" it is sufficient that a vacancy exists; since in the former case the Governor may fill it, under the express words of the Constitution, and in the latter case, he may fill it under section 66 of the Code, which authorizes him to appoint all officers and fill all vacancies, when no other mode is provided by the Constitution and laws.

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2. When important and almost revolutionary results must follow from declaring a session of the Legislature illegal, the Courts are bound to require a most palpable and direct violation of the Constitution, before they interfere. It is the duty of Courts, in passing on the constitutionality of laws, not to pronounce against them, except in a clear case, and to make every intendment possible in favor of their constitutionality.
3. Whether it is in the power of the Courts to hold a law unconstitutional, on the ground that the Legislature passing it is not in session according to the mode prescribed by the Constitution, and to inspect its journals to determine the fact—*Query?*
4. The Legislature having, by a vote of each house, declared that the session of 1870, was not a session after the second session under the Constitution of 1868, it is very doubtful whether this decision is not binding upon the Courts, as the judgment of a tribunal authorized by the Constitution to decide it.
5. Article III., section 1, paragraph 8, of the Constitution of 1868, which provides that “the first meeting of the General Assembly shall be within ninety days after the adjournment of this Convention, after which it shall meet annually, on the second Wednesday in January, or on such other day as the Legislature may direct,” * * *, and that “no session of the General Assembly, after the second, under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof,” may, in a very just and proper sense, be construed to mean by the words, “second session under this Constitution,” second session as provided for and specially required by this Constitution, so as to exclude the “two sessions,” called extra and irregular sessions, which, though legal, are not specially mentioned and required by the Constitution.
6. The session of the General Assembly, which met on the ... day of July, 1868, more than ninety days after the adjournment of the Convention, under the order of General Meade, and more than seventeen days before the Constitution of 1868, as decided by this Court in *Foster vs. Daniels*, 39th Georgia Reports, 89, went into operation, though a legal session may be called an extra or irregular session, and not one of the sessions meant by the Constitution in Article III. of the Constitution.
7. The session of the General Assembly of 1870, may, therefore, be fairly said not to have been a session after the second session, within the meaning of the clause which prescribes that no session, after the second under this Constitution, shall continue longer than forty days, unless prolonged, etc., etc.
8. The Act of October 28th, 1870, directing the Ordinaries of the several counties to assess a tax to pay the salaries of the District Judges and attorneys, is sufficiently definite, since, from the census of 1870, the

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amount due from each county may be ascertained by simple calculation, and the tax books in the Comptroller General's office will furnish the property to be taxed. WARNER, Judge, dissenting.

Constitutional Law. Tax. Before Judge HARBELL.
Randolph Superior Court. May Term, 1871.

This cause was submitted to the Court below upon the following agreed statement of facts: An order was sued out by Taylor against Gormley, as Ordinary of said county, calling on him to show cause why he should not levy and collect the taxes on the persons and property of the Eleventh District of said State taxable by law, for the payment of the salary of Taylor, as District Attorney of said district. Taylor was appointed to said office by the Governor of this State, and commissioned on the 18th of January, 1871, in the recess of the General Assembly. Gormley admitted that, by the Act organizing the District Courts, it is his duty to levy such tax and pay said salary, if Taylor be legally and constitutionally appointed and holding said office. But Gormley says that, under the constitution and laws of Georgia, Taylor is not legally and constitutionally appointed and holding said office. It is admitted that Taylor's appointment was never ratified or confirmed by the Senate of Georgia, and that there has been no session of said Senate since 18th of January, 1871.

The Court held that Taylor's appointment was constitutional, and ordered that the tax be raised and his salary paid. This is assigned as error, upon the ground that the office had not become vacant when said appointment was made, and the Governor had no power to commission Taylor until his appointment was ratified by the Senate.

H. FIELDER, for plaintiff in error. This is not an office under the constitution, because it took an Act of the Legislature to establish the Court. There is no apportionment of the tax between the counties of the district, by law. The

Act of the 28th of October, 1870, organizing these Courts, is void, because it was passed after the General Assembly at its third session had sat forty days, and no two-thirds vote prolonged the session: Constitution of 1868; Dwarris on Statutes, etc., 67-69; 4 Hill, 384; 1 Denio, 9; 2 *Ibid.*, 97; 22d Wend., 9. The office did not *become* vacant: Acts of 1870, page 77; Constitution of 1868; 2 Story on Con., sec. 1559; Paschal on Con., 182, 183; People vs. Forgerer, Brees., 68; 1 Cong. Elec. Cas., 874; 2 *Ibid.*, 613; 16 Am. L. R., 786; 8 Inter. Rev. Dec., 137; Schlash vs. Peavy, Circuit Court, Ark., April, 1869, pamph. 11; 2 Abbott's Dig., U. S. R., title Office.

J. H. TAYLOR; HOOD & KIDDOO, for defendant. This is a constitutional Court: Constitution 1868, Art. 5, sec. 4, pars. 1-7. Appointment: *Ibid.*, 39. Vacancy: *Ibid.*, Art. 4, sec. 2, par. 4. Prior superior Act controls later inferior Act: No. 78 Federalist, page 358; Constitution 1868, Art. 11, sec. 2. Salaries, how paid: Act of 28th October, 1870, secs. 2, 3, pages 77, 78. Tax, how levied: Constitution 1868, Art. 5, sec. 5, par. 2; Code, sec. 548. This was second session of General Assembly: Constitution 1868, Art. 3, sec. 2, par. 3. As to power of General Assembly over this Court: Constitution 1868, Art. 5, sec. 16, par. 1.

McCAY, Judge.

1. The Constitution, Article 5, section 4, declares that, until the Legislature otherwise provides, there shall be a District Attorney and a District Judge in each senatorial district. It defines their duties, fixes the jurisdiction of the Judge, and prescribes how both of these officers shall be appointed, and the qualifications of each of them. The want of certain necessary details, as to the *mode* of proceeding, and some provisions for raising the salaries, made it proper that no such officers should be actually appointed until legislative action was taken in the premises. This was not done until

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the Act of 28th October, 1870. This Act, as well as the Constitution, provided that these officers should be appointed by the Governor, by the advice and with the consent of the Senate. The Act, however, in express terms provided that it should not go into effect until the 1st of January, 1871. No nominations were made and no action taken during the session of the Legislature. That body adjourned 25th of October, 1870.

Soon after the 1st of January, 1871, the Governor, considering these offices vacant, appointed incumbents to hold until the next meeting of the Legislature. Mr. Taylor, the defendant in error, was one of these appointees. Was this appointment, not being with the consent of the Senate, legal? Without doubt, the provision of the Constitution and of the Act of October 28th, 1870, for *filling* these *offices* for the full term, does not cover the case of vacancies. The Constitution, in express terms, provides, "that when *any* office becomes vacant, the Governor shall have power to fill it, unless otherwise provided by law: Article 4th, section 2, paragraph 4.

This applies *to all* officers of every kind, no matter how or by whom, the office is to be permanently filled. The incumbent is to hold until a successor is appointed, according to the regular method for filling the office: Article 4, section 2, paragraph 4.

If elected by the people, or by the Legislature, or appointed by the advice of the Senate, no matter how it is made the duty of the Governor to fill the vacancy, until it is filled, as provided, either by the Constitution or by the law. Nor does it matter *when* the vacancy happens. Whenever, or however it happens, it is the duty of the Governor to fill it, until it is filled in the mode and by the power provided for permanently filling it, unless the Constitution or the law points out some other mode.

As to officers elected by the people, the *law* has generally pointed out a mode for filling vacancies. Sometimes it is by

an immediate election ; sometimes by appointment of the Ordinary ; sometimes by appointment of the Judge of the Superior Court ; sometimes by appointment by the Governor. But as to all officers elected by the Legislature, or appointed by the Governor, with the advice of the Senate, no other mode is pointed out by either the Constitution or the law. So that, as to these offices, it is the duty of the Governor to fill every vacancy not, as is often said, until a successor *can* be appointed, agreeably to the Constitution, but until one is appointed agreeably thereto. Even if the Senate be in session when the vacancy happens, it may be that the Governor fails in his duty to nominate, or he and the Senate cannot agree ; or, if the office be one filled by legislative election, they may fail to elect. The Constitution does not intend that there should fail to be an incumbent, since it provides, that *in all cases* where no other provision is made, if any office become vacant, the Governor shall fill the vacancy until the office is filled in the mode provided for filling it permanently.

Our Constitution is very different from the Constitution of the United States. That only gives the President power to fill vacancies which happen *during the recess of the Senate*. Our Constitution has no such limitation. It simply provides that, "when any office becomes vacant, by death, resignation or otherwise," the Governor shall have power to fill it until it is filled in the mode provided by law. But it is argued that the words here used cannot apply to this case. The words are "become vacant." It is said that this implies that the office has been filled, and has "become vacant."

It is very clear that in the case under discussion there was *in fact* a vacancy existing. There was an office ; the Constitution provides for that. All the details necessary for the full carrying into effect of the Constitution were provided by the Act of 28th of October, 1870. Nothing was wanting but men to fill the offices. If this was not a vacancy the word is wrongly defined by the law, books and lexicograph-

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ers. Webster defines it: "The state of being destitute of an incumbent." Bouvier: "A place which is empty."

It does seem to me that the distinction between "is vacant," and "become vacant," is a distinction without a difference. Mr. Wirt, Mr. Legare and Mr. Taney, in their official opinions as Attorney-Generals, have all concurred in holding that, if a vacancy "exists" during a recess of the Senate, it may, in a very fair sense, be said to "happen" then, though in fact it occurred before the recess. And this has been the uniform practice and holding of the Executive Department of the United States. Mr. Wirt, in his opinion, insists that the words "may happen during the recess" are to be understood as "may happen to exist during the recess:" Opinions Attorneys-General, volume 1, page 631. Mr. Roger B. Taney fully agrees with this construction: Opinions Attorneys-General, volume 2, page 525. So, too, Mr. Legare: *Ibid.* volume 3, page 673. But suppose we admit that an office never yet filled cannot be said "to become vacant;" what then? The most that can be said is, that, though the office is "vacant," it has not "become vacant," and the *Constitution* has not provided in terms how it shall be filled. The Constitution provides for filling offices permanently and for filling offices which have "become vacant." Vacancies which are not cases when the office has "become" vacant are not *provided* for by the Constitution.

Are such offices to remain vacant until the Senate meets, or the Legislature elect, or the people choose? I think not. The law—the Code, section 66—provides that the Governor shall fill *all* vacancies, unless otherwise prescribed by the Constitution and the laws.

I conclude, therefore, that the most reasonable construction of the Constitution clothes the Governor with power to fill this vacancy, and that, even if this be an office which, though vacant, did not "become" vacant, the power is still in the Governor; since if it be a *casus omissus* in the Constitution, it is provided for by section 66 of the Code, which

authorizes the Governor to fill all vacancies not otherwise provided for. It may not be amiss to say that this is not a new question in Georgia. The Pataula Circuit was created by the Legislature on the 8th of February, 1856. By the laws, as they then stood, the election for Judge was by the people, and did not take place until April, 1857. Governor H. V. Johnson appointed Judge Kiddoo to fill the *vacancy* until the election.

At the same time and under the same circumstances the Governor appointed a Solicitor-General for the Circuit. So, too, when the Talapoosa Circuit was created, February 29th, 1856, the election for Judge and Solicitor-General was provided for to be held in October, 1857, and the Governor, under *his power to fill vacancies*, appointed Judge Hammond, Judge, and Mr. H. Fielder, Solicitor-General. So, too, when the Brunswick Circuit was created, the Constitution provided that the Judge and Solicitor should be elected by the people. The Act creating the Circuit authorized the Governor to appoint a Judge until the election. The Governor appointed the Judge accordingly; but he also at the same time, under his general power *to fill vacancies*, appointed a Solicitor-General.

In 1838, the Legislature created the office of Commissioners of Banking, providing that they should be elected by joint ballot by the Legislature. Mr. Iverson L. Harris was elected one of the Commissioners, but declined to serve, and no other election was had. After the adjournment Governor Gilmer appointed Mr. White to fill the *vacancy*. The Legislature, at its session of 1858, *created* the office of commissioners to revise the Code, providing three commissioners to be elected by the Legislature. Before the adjournment, I. L. Harris, David Irwin and Herschel V. Johnson were elected. Messrs. Harris and Johnson declined to serve, and Governor Brown, after the adjournment, appointed Messrs. T. R. R. Cobb and R. H. Clark. There are, doubtless, other instances, but these are sufficient to show what has been un-

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derstood to be the meaning of the word "vacancy," to wit: An office without an officer, and that in such cases it is within the powers of the executive to fill it. These cases prove, too, that, to make such a vacancy, it is not necessary that the office should have been once filled in the regular mode before such a vacancy as the Governor can fill, may occur.

For these reasons I am satisfied that, under the Constitution and laws of this State, it was within the power of the Governor to make the appointment of Mr. Taylor, and having done so, his right to receive his salary, under the law, is undoubted.

2. It is contended by the plaintiff in error that, admitting the appointment to be properly made under the Constitution and laws, Mr. Taylor is not entitled to his salary, however the Act of the General Assembly to carry into effect the constitutional provisions as to the district Court, was passed and approved, as appears by the journals and the signature of the Governor on the 28th of October, 1870; that this was more than forty days after the commencement of the session, and that, as the session of 1870 was the third session under the Constitution of 1868, any Act passed by the Legislature more than forty days after the commencement of the session, is unconstitutional and void; since it does not appear by the journals of the two houses that any two-thirds vote was had prolonging the session.

It is true, in fact, that, under the orders of General Mead, the then military commander of Georgia, under the Act of Congress of March 2d, 1867, there was a session of the Legislature, commencing on the 4th of July, 1868. It is also true that there was a session, as the Constitution provides, commencing on the second Wednesday in January, 1869.

It is difficult to say when the session of 1870 commenced. The body met on the 10th of January, 1870, under a call of the Governor, two days before the second Wednesday, as

required by the Constitution. It proceeded to reorganize as a new body, and its organization was reported complete on the 30th of January, 1870. On the 14th of February it adopted the amendments to the Constitution of the United States, as *required* by Act of Congress of December, 1869. It then took a recess until the 14th February, then met again, and elected Senators, passed various resolutions, and took a recess until the 18th of April. It had, at this recess, been in session thirty-nine days. It met again the 18th of April, continued in session, doing nothing until the 4th of May, when it took a recess until the 6th of July. It then met, but did nothing until the 18th of July, when it proceeded to business formally, Congress having at length declared the State to have fully complied with the Reconstruction Acts.

If the session of 1870 commenced, by law, on the second Wednesday in January, (the 12th of that month,) forty days expired on the 21st of February, 1870. If only the days actually consumed, not counting recesses, are to be considered, the forty days expired on the 19th or 20th of April. If the session is to be considered not to have commenced until the 18th of July, when it proceeded regularly to business, then the forty days expired on the 28th of August, 1870. In any event, not only the Act referred to, but almost *all* of the other Acts passed at the session of 1870, were passed after the forty days had expired. After the 28th of August the Legislature passed many Acts of the most important character—Acts which have been solemnly acted upon by the people and by the Courts, and if these Acts are void, consequences almost revolutionary in their character must inevitably result. It may be that this Court must do its duty, no matter what may be the consequences. But it is also true that it is the solemn duty, not only of this but of *every* Court, when called upon to determine any question, and *especially* when called upon to declare an Act of the *General Assembly* void, to look to the consequences, and if

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they be of almost a revolutionary character, to be very clearly satisfied, before producing such startling and revolutionary results. After forty days had expired the session of 1870 changed the time for the meeting of the Superior Courts in twenty-five counties of the State. It changed the time for the meeting of the Supreme Court from the first Mondays in June and December to the second Monday in January and the first Monday in July. It directed a revision of the jury boxes all over the State. It created three new Judicial Circuits, and created four or five new counties. It authorized bills of exceptions to be brought to the Supreme Court on the granting or refusal to grant injunctions, and changed the mode of proceeding in the Supreme Court in many particulars. It altered the day fixed by the Constitution for electing members of Congress, members of the Legislature, and county officers. It altered the day fixed by the Constitution for the meeting of the General Assembly. These Acts have all been treated by the Courts and by the people as of force for nearly a year. The Superior Courts have met under these Acts; the jury boxes have been revised under them; the new circuits and the new counties have gone into practical operation, and for nearly a year have been proceeding as legal bodies under these Acts. This Court has held one full session, and is far advanced on another, in obedience to these Acts, and has constantly recognized and acted upon the Acts of the session of 1870, after the forty days, as legal Acts. The people, in obedience to one of these Acts, allowed the election day fixed by the Constitution, to-wit: the Tuesday after the first Monday in November, 1870, to pass, and no election was held to fill these important offices until the 20th of December, 1870. So, too, the day fixed by the Constitution (to-wit: the second Wednesday in January) for the meeting of the Legislature in 1871, has, in obedience to one of these Acts, been allowed, by the members elect, to pass, with the understanding that the proper day for the meeting is in

November, 1871, as provided by the session of 1870, by an Act approved October 28th, 1870, after forty days had expired.

If the law under which Mr. Taylor was appointed is void, because passed after forty days, then the sessions of the Superior Courts, changed by the said session, have been illegally held; the last session of this Court was illegal, this session is illegal; and we (holding an illegal session) are called upon to determine the session of the Legislature, when these Acts were passed, illegal. The Clerks, Sheriffs, Tax Collectors, and other county officers, now in office, are all illegally in office. The jury boxes have been illegally revised, the Legislature elect is illegally elected, and the old Clerks, sheriffs and county officers are still the legal officers. Nay, more, the old Legislature, elected in 1868, is still the legal Legislature; since the Constitution, in express terms, Article 3, section 1, paragraph 2, provides that the members of both Houses, though elected for two years, shall continue to hold until their successors are elected and qualified; a conclusion so extraordinary, and involving results so momentous, a conclusion resulting in the illegality of the sessions of the Superior Courts and of this Court, and in the illegality of the elections of all the Clerks, sheriffs, county officers, members of the Legislature, and members of Congress, and in the loss of any session of the Legislature for 1871, should only be the result of the clearest convictions, and be unaccompanied by any, even the most trifling, doubt of its correctness. Every intendment should be made that is at all compatible with sound reason or fair construction. We have been at sea long enough. Even one day of an illegal government is an evil that it may take years to see the consequence of, but from a whole year of illegal Courts, and a whole session of an illegal Legislature, who can calculate the evils that must ensue?

If it be possible to prevent this by any fair and just construction; if this Court is not *driven* by the clear and incon-

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testible rules prescribed for its action so to determine, it is its solemn duty to the public and to the law to sustain, and not to overturn, the Acts thus assailed.

3. For myself, I have great doubts as to the power of the Courts, under the Constitution, to pass upon the legality of a session of the Legislature. We are bound, it is true, to declare laws not in conformity to the Constitution void. But there is a plain distinction between an Act of the Legislature and a session of the Legislature. It seems to me a very dangerous thing, and one not contemplated by the Constitution, for one of the branches of the government to set in judgment upon *the legality* of another. The Constitution expressly clothes each House with the power to judge of the qualifications of the members, and if they may do this as to each member, it would seem to follow that they may do it of the whole combined. Is this Court to step in to scan its daily proceedings, watch its journals, and set, as a censor, upon its doings? We are compelled to say, whether any separate Act, passed by it, conforms to the Constitution, but whether the body itself is in session at the proper time, seems to me to be left to the conscience and judgment of the body itself. And this, I think, is the tenor of the authorities.

4. But I do not rest my judgment upon this view of the matter alone. It is a fact, as appears by the journals, that the Legislature, by a vote taken in each House, determined that the session of 1870 was not a session after the second, under the Constitution. The Senate declared, that the session of 1870 was the first session: Senate Journal, page The House declared simply that it was not a session after the second: House Journal, page We have thus the solemn judgment of each branch of the General Assembly, that, under the circumstances, no vote of two-thirds was necessary to authorize the session of 1870 to continue longer than forty days. Was not this a matter proper for the judgment of the Legislature, and having been deliberately made, is not the judiciary bound by it?

5. Nor is it all clear to my mind that this judgment was not right, or that the session of 1870 was one which was required to be prolonged by a two-thirds vote, in order to continue in session longer than forty days. The clause of the Constitution is as follows: Article 3, section 1, paragraph 3: "The *first* meeting of the General Assembly shall be *within* ninety days after the adjournment of this Convention, after which it shall meet annually on the second Monday in January, or on such other day as the General Assembly shall prescribe." "No session of the General Assembly after the second, under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof."

The Convention adjourned on the 12th of March, 1868. Ninety days after this would be the 10th of June, 1868. No session of the General Assembly was held until the 4th of July, 1868, so that the first regular appointed session under the Constitution was not held at all. The session which met July 4th, 1868, was not provided for by the Constitution, but was *called* under the orders of the military commander, and met at his behest. That session did not meet by virtue of the Constitution.

6. Indeed, this Court decided in *Foster vs. Daniels*, 39 Georgia, 39, that the Constitution did not go into effect until the 21st of July, 1868, and that the County Court, which the Constitution *in terms abolishes*, was a lawful Court on the 20th of July, 1868, but unlawful on the 22d of the same month. Can that be fairly said to be a session according to and by virtue of the Constitution which met seventeen days before the Constitution became the law of the land? The truth is that a state of things occurred for which the Constitution made no provision, it was a state of things not contemplated by the Convention. It supposed Congress would immediately ratify the Constitution, and it expressly provided that the first session should be *within* ninety days after the adjournment. Congress did not ratify the Constitution

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within ninety days, and the first session, as provided for, was not held at all.

7. As I have said, the session of July, 1870, was a called session, not a regular one, according to the directions of the Constitution, and it met seventeen days before the Constitution had any existence, as a rule for the government of the day of meeting. Indeed, the Constitution, as it now stands, did not exist at all until the 21st of July, 1868, since upon that day the Constitution was so altered as to comply with the requirements of the Act of Congress of June 1st, 1868. After that day the Constitution was of force, and the General Assembly controlled by it. But it is very clear that the *meeting* of the session of 1868 was not only not provided for or pointed out by the Constitution, but the *meeting* was by virtue of the order of the military Commander, who then exercised supreme power in the State.

I do not say that the session of 1870 was illegal, or that its laws and actions are not to be considered as passed under the Constitution, though that is a view taken by many. The idea I intend to convey is, that though a legal session, it was not a regular, but a *called session*, and was not one of the two sessions which, by the Constitution, might hold more than forty days without a two-thirds vote of prolongation. The language of the Constitution is peculiar. It first provides for a session within ninety days after the 12th of March, 1868, and this it calls the "first session." It then provides that after this the meetings shall be on the first Wednesday in January of each year, until otherwise provided by law. Then, in the same Article, section and paragraph, come the words now under discussion, to-wit: "no session of the General Assembly, after the second under this Constitution, shall continue longer," etc. What is the obvious meaning of this, taking the whole paragraph together? It can hardly be supposed that the Convention contemplated a meeting of the Legislature which should not, in its deliberations, be controlled by, and be in this sense under the Constitution.

Something must have been meant by the words, "under this Constitution" other than this. In that sense, the words are surplusage, since in no event, then conceivable, could it be imagined there would be a session of the Legislature "not to be controlled by the Constitution." The reason for using this language is plain; the Constitution had provided for a first session, to-wit: within ninety days. It had provided for other regular annual sessions, to-wit: on the 2d Wednesday in January in each year, or such other day as the General Assembly may prescribe. It then adds: "No session of the General Assembly, after the second under this Constitution shall," etc.; that is after the second, as pointed out and directed, and provided for by this Constitution. The object was to exclude from the two sessions contemplated any called, extra or irregular session, and to declare that the two sessions meant, were two sessions held at the times provided for by the Constitution.

Such is the natural grammatical construction of the words. The words "under this Constitution" qualify the word "session," and not the words "General Assembly," and mean "session," as provided for, fixed by this Constitution. And the object was, as we have said, to exclude from the two sessions any called, extra or other sessions which, though lawful, were not nominated and pointed out specifically in the Constitution. Such a construction is, at any rate, a fair one, and, even if it be doubtful, it is sufficiently fair and plain, under the well established rules controlling the judiciary in their judgment of constitutional questions, to make it proper for us to adopt it. It is the settled rule that, in cases of doubt, the Courts will alway decline to declare a law unconstitutional. Respect for a co-ordinate branch of the government, and, in this case especially, the almost total revolution which the holding a whole session of the Legislature illegal, would produce, not only justifies, but imperatively demands, a very clear case. We do not think this is such a case. On the contrary, the strength of the argument is in favor of the legality of the session after forty days.

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8. We think the Act of October 28th, 1870, is sufficiently definite. It fixes the salary according to the population of the district. That is easily ascertained. The Constitution recognizes the United States census as an official mode of ascertaining the population of a district, since it clearly contemplates that the representation of the counties in the lower House shall be based upon it. Constitution 1868, Article

That census was taken in 1870, and can be easily procured. The tax is, by this Act, to be raised upon the taxable property of each county proportionably. That can be officially ascertained at the office of the Comptroller-General.

Under the rule that "that is certain which might be made certain," we think this sufficient *data* upon which to ascertain and assess the salary and the share due from each county.

LOCHRANE, Chief Justice, concurring.

The question raised by the record in this case, is not merely the constitutionality of a legislative Act, but the constitutional competency of the Legislature to pass any Act. The Constitution of 1868, provided that the first meeting of the General Assembly should be within ninety days after the adjournment of the Convention framing the Constitution. The first Legislature did not meet at that time. It was called together under the Reconstruction Laws of Congress, and was qualified by a Judge of the United States Court, with a Provisional Governor, and was itself a Provisional Legislature. The convocation, organization, and qualification was alien to the Constitution, neither under it, nor within its provisions.

The last session was alike a called session, invoked by Act of Congress, under military supervision and qualification, with a Provisional Governor, and could not perform the first act of a Legislature under the Constitution of 1868, to-wit :

pass upon the qualification of its own members; but a military commission performed this function.

The Legislature, in considering their status when in session in 1870, were not limited to the Constitution of 1868, but were properly to consider the Acts and action of Congress, and when the Executive Branch, by message of July 2d, 1870, held that session to be the first under the Constitution, and the General Assembly held it, in one branch concurring with the Executive, and in the other that it was not the *third*, such decision upon a question of political government, growing out of the surrounding legislation of Congress, does not invoke judicial interference, by the abstract application of mere constitutional limitations.

The Supreme Court is a Court for the correction of legal errors, and questions arising out of the formation of the State government and its relation to the Federal Union, or questions determined by the Legislature, as to whether its sessions, convened by military authority, under a Provisional Governor, were under the Constitution or under Acts of Congress, are not properly such legal errors, if errors, as invoke the judicial interference of a co-ordinate branch of the government. Under the changes of Reconstruction, by Amendatory and Supplemental Acts of Congress, Georgia presented so many political phases, and such multiform legislation, that the intention of the original Act under which the Constitution was framed, became lost in the maze of complications, and the Act of 1867 was not carried out in its covenants, but new and unknown powers were called into requisition. Courts cannot, by any rule of constitutional law, measure the rights of the one, or define the limitations of the other; and inasmuch as the political departments have solved the status of the State, and such decision violates no fundamental right, such decision should be respected by the other co-ordinate branch, or State judiciary. And for these reasons I concur in the judgment of the Court.

The Constitution of this State declares, "no session of the

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General Assembly, after the second under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof." Code, section 5122.

Among the fundamental articles to the Constitution it is declared, "Legislative Acts in violation of this Constitution, or the Constitution of the United States, are void, and the judiciary shall so declare them." Code, section 5107.

Section 5143 is in these words: "When the Constitution requires a vote of two-thirds of either or both Houses for the passing of an Act or resolution, the yeas and nays on the passage thereof shall be entered on the Journal.

Under these constitutional provisions, it is contended:

1. That there were three sessions of the General Assembly since the adoption of the Constitution of 1868.

2. That the last session was the third, and that it sat over forty days, and the Journal fails to show that its term was extended by a vote of two-thirds.

3. That, inasmuch as the Act was passed organizing the District Courts after the term of forty days, it is *void*, being in violation of the Constitution, and that it is the duty of this Court so to declare it.

The question raised by this record is one of the highest and most vital importance; it is not, as will be seen by a glance, the constitutionality of an Act of the Legislature we are called on to decide, but the constitutionality of the Legislature itself, its constitutional competency to pass any Act, We are not invoked merely to construe the terms of legislation, but the power of the Legislature to legislate; and this turns upon the question whether the *last* session of that body was or was not the third, or one "after the second under the Constitution." In approaching the adjudication of this subject, I have grave doubt as to the right of the Judiciary to pass upon it, for reasons I will hereafter give. But with a view to meeting the question first upon its merits, and treating it as a judicial question, we may safely

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assert the proposition laid down embraces others essential to its demonstration. Under the Constitution, section 5122, Code, it is provided that the first meeting of the General Assembly shall be within ninety days after the adjournment of the Convention, after which it shall meet annually on the second Wednesday in January, or on such other day *as the General Assembly may prescribe.*" Now to constitute a session under the Constitution it will not be doubted, but it must *meet* at the time prescribed by the Constitution, or at a time prescribed by the General Assembly. The first session did not so meet. History informs us, from the Journals of the House, that it was called together on the.....day of..... by military order, and the Governor was provisional Governor only. And the very first constituent power of the General Assembly, to-wit, (Code, section 5135,) "Each House shall be the judge of the election returns and qualification of its members," was denied to it. That session was called together, and when convened its members were qualified by the Hon. John Erskine, Judge of the District Court of the United States. Attempting to act under the Constitution as to the provision just quoted, *to-wit: adjudging the qualification of its members*, and turning out some on the ground of disqualification, its own existence was afterwards, by Congress, declared to be illegal, its action ignored, and its organization perfected by laws of the United States, and not by the Constitution of 1868. The decision of the question involves the constitutionality of the laws of Congress; for it is clear that if the Legislature was subordinate to a military dictation, it cannot be held to be under a constitutional limitation; for at best it only existed by *permission*. It is useless to stand upon theories if facts are antagonistic to them. When Congress undertook to reconstruct the State, it began the work by a declaration that there was no civil government in Georgia; the language used was: "Whereas no legal State governments," etc., "now exist in the rebel States," etc.

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The sixth section declares, "That until the people of the said rebel States shall, by law, be admitted to representation to the Congress of the United States, the civil governments that exist therein shall be deemed provisional only, and shall be, in all respects, subject to the paramount authority of the United States, at any time to abolish, modify, control and supersede the same," etc., etc. Under this declaration, Governor Jenkins was superseded by military authority enforcing such Acts, and a gentleman, in commission as a United States officer of the army, was detailed Governor of the State. He entered upon the discharge of his duties, and the whole civil administration went into his hands. The election of members of the Convention and their meeting at Atlanta, and framing this Constitution, are facts well known; the enfranchisement of a new element into the body politic, and their exercise of suffrage, under Congressional legislation, facts that have become patent. The ensuing election, ending with the declaration of the ratification of the Constitution, and the returns of members, was followed by the order calling them together. When they met, in pursuance to the military chieftainship in Georgia, was it a meeting of the Legislature under the Constitution? The Constitution did not provide for such measures, nor did it define the duty of a Provisional Governor. We may struggle in vain to find any recognition of the officers who called them together, or the definition of their duties. This Court, in 39th Georgia, 40, held that the new Constitution went into effect on the 21st of July, and yet the body met on the 4th. If the Constitution did not take effect until the 21st, as decided by this Court, Judge Warner delivering the opinion, then it did not *meet* under the Constitution, and therefore it must have *met* under something else. And if it met under something else, it was not the first meeting of the Legislature under the Constitution. If it met under the Reconstruction Acts of Congress, called together by virtue of the power conferred by those Acts on Major General Meade, then it cannot be

held it met under the Constitution, except the one embraced the other, and this can only be conceived by ignoring the source of the Constitution, to-wit: the people of Georgia, and give its paternity to Congress.

Again, if the *Constitution* existed by permission of the military power—in other words, if the authorities then governing Georgia allowed its recognition, by permission, it was not the Constitution that was the rule, but the power behind it. Until it stood upon the will and sovereignty of the people of the State, and had an existence beyond the permission of any power, an existence inherent and unquestionable, it could not, with proper regard for the use of language, be called the *Constitution* of Georgia, in that broad political sense, which comprehends the dignity and sovereignty of the people. It was a written parchment, subject to a will incompatible with the constitutional will of a free people. And to talk of a General Assembly under a Constitution, whose rights to do the first constitutional act of a constitutional Legislature, to-wit: pass upon the election returns and qualifications of its own members is denied, is the assertion of a sentiment, not the embodiment of a fact. What became of the Constitution and its guarantees, when Congress returned to seats in its General Assembly, some thirty members, and dispersed as many to their homes?

Thus we say, upon the merits of the question, we do not think when the Legislature decided that the last session was not the third, and overruled the ruling of the Speaker upon that subject, that it was a question of violation of the Constitution; for in the phases of reconstruction in Georgia, the status of the State was a difficult one to solve, and not without grave doubt in the premises; the incubation was long and the travail protracted, and the decision of the Legislature on the subject, one at least, sustained by the legal development of events.

But is it a question for the Judiciary. No evil could be more offensively aggressive on the rights of the people, than

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the assumption by the Judiciary of powers not delegated to their rightful jurisdiction. To lodge, in the opinions of a few men, no matter how far removed from the passions of the hour, the rights of the people in the creation of government and decision of affairs of State, was not the intention of the people. Constitutions and laws precede the Judiciary, and we decide questions arising out of them after they are made, not before. We restrain the Legislature within the limitations set to its powers. But we may not set up our opinions as to the decision of the Legislature upon questions not purely legal. The Constitution prescribes the manner of passing laws, and the Legislature must pursue the mode prescribed. The Constitution divides powers, and the co-ordinate branches must stay within the prescribed limits. If this were not so, the Judiciary might declare an Act void, and the Legislature might impeach the Judiciary, as happened in Illinois, for the decision. The intention of the Constitution is to divide the powers, and let each move independently in its orbit, all revolving round the Constitution in their appropriate sphere, like the planetary systems round the sun, and each kept in place by the central power which moves the whole in harmony.

The jurisdiction of the Judiciary is to check and balance the acts of the Legislature, to bring them within the Constitution, and hold the scales evenly in the administration of the laws enacted. But in this case, we are called on to reverse the judgment of the Legislature on the condition growing out of the reconstruction of the State. The Legislature decided its last session not to be third in the House, and in the Senate, under the Constitution of 1868, and this judgment we are called upon to say was wrong.

Now, before going further, let us glance at the consequences of this decision. I am not unaware that ordinarily Courts have nothing to do with questions of public policy, or the entailment of consequences. No man better understands the necessity of lifting the Judiciary above the popu-

lar prejudices or sympathies than myself. But while in the language of Lord Mansfield, "We have nothing to do with consequences; if certain rebellions were the result, we cannot prevaricate with our consciences or our God; all we have to say is, *fiat justitia ruat cælum*;" yet with all judges, consequences must needs influence consideration. We should pause upon the enunciation of legal judgments whose effect would be to upset society, and turn loose chaos over the land. If the law is clear, we have nothing to do but announce it. The consequences are not at our doors, and if this decision should declare void the last election for members of the General Assembly, passed after the forty days, and should bring to new life the *old*; whose commissions may extend until their successors are duly elected and qualified, and if this may postpone the election, under the Constitution, still, if such were to be the result, and the law is plain, it is our duty, and it would be my pleasure to discharge it. But to do so, I think consequences have something to do with invoking a more thorough consideration of all the questions arising under the facts of the case, before announcing it to be the law, and by that examination, I find involved in this decision of the Court a reversal of the judgment of the Legislature as to the *status* of the State under reconstruction. This embraces a political, as well as legal question, and it would be an ostentatious parade of learning to go through the decisions of Courts, excluding political questions involving the principles of government from judicial jurisdiction. The very question, made by Governor Jenkins before the Supreme Court at Washington, on the constitutionality of the Reconstruction Acts, admonishes me of the fact that these matters were, while regarded by the profession of Georgia plainly and palpably unconstitutional at the time, nevertheless *political* in their character, and *refused* a hearing at the bar of that tribunal. Our Court, by its organization, is a Court of errors, and the original jurisdiction over this question of what session, under the Constitution, the last was, must be

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somewhere else lodged. This case comes from the Superior Court, and that tribunal, by the Constitution (Code, section 5173,) is vested with jurisdiction over all civil and criminal cases, etc. But no where can it be inferred by any legitimate line of argument, that the jurisdiction over an adjournment of the Legislature, has been conceded or granted to it. The power in all Courts to declare unconstitutional Acts void is not longer a matter of judicial controversy, but the power to review an Act of the Legislature, involving a political question—not a law—but a judgment pronounced by itself, upon its own competency to make a law, is not an appellate jurisdiction, nor is it an original jurisdiction. If it exists, it exists in the powers of the Court under the Constitution, and the power to declare Acts in violation of the Constitution void, and this is expressed to be in regard to *legislative acts*.

In the case of *Foster Administrator vs. Daniel*, 39 Georgia, 40, this Court held that the State of Georgia, on the 21st July, 1868, had *fully complied* with the terms of the Reconstruction Acts of Congress, and that the Constitution went into effect upon the 21st July, 1868. But although so decided by the Court, as applicable to the then case before it, it is true that the Reconstruction Acts provided that “until the people of said rebellious States shall be by law admitted to representation in Congress, any civil government which may exist therein shall be deemed provisional only,” and we need not go through the mass of military orders interpreting and enforcing these Acts subsequent to the time stated. The purpose is not to go farther than show the doubt which still hung over the *status* of this State; for if the Congress of the United States, by enactment recognized a different view of our condition, Congress had the *power*, under the Constitution of the United States, to control the question, and we need not deny *the right* without going farther and adjudging the *Acts themselves*, which is not essential or proper in this inquiry. If we establish the fact that subsequent to this decision Con-



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gress again legislated upon the subject, and in effect declared the *General Assembly* illegally organized, and by military commission, passed upon the qualifications of its members, then the *practical operation* of the Constitution of 1868, if existing on the 21st July, 1868, was amended by such subsequent Congressional interference, and the conditions imposed by Congress were paramount to the Constitution of 1868, and right or wrong, were of force and exacted obedience. When the Legislature deemed it necessary to go through the ceremony of adopting the Constitutional amendments over again, it was a political question, of which they were properly the judges; the question was not judicial, and is consistent with the view entertained by that body afterwards, relating to the term of session under the Constitution, they were then holding.

From these various sources I gather the intent of the Legislature to concur with the opinion of Congress upon the subject, with the orders of Generals Grant and Rawlins, Pope, Meade and Terry, and their constructions thereon, and the opinion of the Attorney-General; and looking to this intent with a view to arrive at a judicial conclusion, I hold that the subject of what *term*, under the Constitution, the Legislature then was holding, was one to be construed, not only by the Constitution of 1868, but by the Acts of Congress covering the Reconstruction measures. And inasmuch as this department of the government decided the question in the light of all the surrounding legislation and powers, I think such decision was political in its character, and that the Court cannot justly interfere by its judgment to set it aside, and declare all its *laws* to be, on that ground, *unconstitutional*. In this connection we may add that the Executive of this State took the position in his message to the Legislature, July 2d, 1870, that "the present legislative organization, if accepted and ratified by Congress, is the first and only legal organization *de jure* of this Legislature and of

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the State Government established by the votes of the people under the Reconstruction Acts."

These two branches of the government of this State—the Executive and Legislative—have treated this question as a political one, of which Congress was the judge. And Congress having by its legislation given the fullest concurrence in this view, I am indisposed to enter upon the subject as a judicial one, inasmuch as now these questions would involve others of significant importance in the adjudication. It will, for instance, not be doubted or denied but the first Legislature was called together by virtue of a military order under the Reconstruction Acts; equally true and undeniable is it that it was sworn by an officer of the Federal Judiciary. Equally true that it convened as a provisional Legislature under a provisional Governor. Equally true that it did not meet at the time fixed by the Constitution. Equally true that its action was permissive by the military powers. Equally true that Congress treated it as a provisional body, amenable to Congressional dictation and interference. Equally true that the session under adjudication was convened by an Act of Congress. Equally true the last session was inaugurated by military commission, sitting upon the qualification of its members. And after a full review of the anomalous condition of the State Government during the years elapsing since the war, I cannot hold that this question is one for the Judiciary to interfere with. And I therefore concur in the judgment pronounced by the Court. As to the questions raised by the record, I have no doubt, holding the Act constitutional as to the appointments made under the provisions of the Code, and now only express my concurrence in the judgment pronounced.

WARNER, Judge, dissenting.

This was an application to the Judge of the Superior Court for a *mandamus*, by Joseph H. Taylor, Esquire, as District Attorney for the Eleventh Senatorial District, against

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the Ordinary of Randolph county, calling on said Ordinary to show cause why he should not levy and collect a tax for the payment of the salary of said District Attorney, for the year 1871, as required by the Act of 1870, organizing the District Courts in this State. The Ordinary filed his answer, and showed for cause why he should not levy and collect the tax on the citizens of Randolph county, that the said Joseph H. Taylor was not legally and constitutionally appointed District Attorney, and was not, therefore, entitled to have said tax levied and collected for the payment of his salary as such District Attorney. On the hearing of the case, the Judge held and decided, that the petitioner was legally and constitutionally in said office of District Attorney, and ordered the *mandamus* to be made absolute against the Ordinary for the levy and collection of the tax as prayed for. Whereupon the Ordinary excepted.

It appears from the record, that the petitioner was appointed District Attorney on the 18th day of January, 1871, during the recess of the Senate, and that said appointment had not been submitted to and confirmed by the Senate. On the argument before this Court, two questions have been made. First, that if the Act of 1870, organizing the District Courts, is a legal and valid Act, yet, the appointment was not a legal and valid appointment under the Constitution, and the provisions of that Act. Second, that the Act of 1870, was passed more than forty days after the commencement of the third session of the General Assembly, and is, therefore, void, under the provisions of the Constitution of 1868, that body having no lawful power or authority to enact laws after the expiration of forty days, unless prolonged beyond that time, by a vote of *two-thirds* of each branch thereof, as provided by that Constitution.

I propose first, to consider the legality of the appointment of the petitioner as District Attorney, under the Constitution and the Act of 1870, on the assumption that that Act is a valid, constitutional law. By the 4th section of the 5th Ar-

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ticle of the Constitution of 1868, it is declared, "Until the General Assembly shall otherwise direct, there shall be a District Judge and a District Attorney, for each Senatorial District in this State." The 9th section of the 5th Article of the Constitution, declares that said District Judges and Attorneys, "*shall be appointed by the Governor with the advice and consent of the Senate.*" These sections of the Constitution, it will be observed, only declare that until the General Assembly shall otherwise direct, there shall be a District Judge and District Attorney, for each Senatorial District in the State, and expressly declare how and in what manner they shall be appointed. But there is no provision made in this section of the Constitution, for the creation and *organization* of a District Court, in which these officers could officiate and perform their respective official duties. To create and organize the *District Court*, in conformity with the provisions of the Constitution, was devolved on the General Assembly; and until that body created such a Court, there was no "District Court" in which the District Judges and District Attorneys could perform their respective duties as such officers. The 1st section of the 5th Article of the Constitution declares, that "the *judicial powers of this State*, shall be vested in a Supreme Court, Superior Courts, Courts of Ordinary, Justices of the Peace, commissioned Notaries Public, and such *other Courts* as have been or may be established *by law.*" Thus it will be seen, that there was no *judicial power* vested by the Constitution in the *District Courts*, until they were established *by law*; and the Judges and Attorneys thereof could not have exercised any *judicial* functions, or performed any other acts appertaining thereto, in *that Court*, until it was so established. On the 28th of October, 1870, the General Assembly passed what purports, on its face, to be an Act to *organize* "the District Court," and defines its jurisdiction. Up to this time, there was no District Court created and organized in this State, either by the Constitution or the laws thereof, in which any District

Judge or District Attorney, had ever officiated as the officers of such a Court, or performed any official duty therein, as the officers of such a Court. Assuming that the creation and organization of the District Court by the General Assembly, on the 28th of October, 1870, was a legal and valid organization, how and in what manner did the General Assembly declare *that Court* should be created and organized? The 1st section of that Act declares, that there shall be organized in each Senatorial District, (except certain specified Districts,) *a Court*, to be styled "the District Court," the Judge of which shall be known as "District Judge;" for *said Court*, there shall be in each District a prosecuting officer, to be called "District Attorney." The 2d section of the Act providing for the *organization* of the District Court, expressly declares, that the District Judge and Attorney shall be appointed by the Governor, *with the advice and consent of the Senate*, and hold their offices for a period of *four years*. Thus it will be seen, that the *original organization* of the District Court, under the provisions of the Act, was to be done by the appointment of a District Judge and Attorney by the Governor, *with the advice and consent of the Senate, for a period of four years*. And the General Assembly having expressly declared *the manner* in which the officers should be appointed, in order to effect an organization of *the Court*, it is not reasonable to suppose that it was intended that *the Court* should be organized by the appointment of the officers thereof, in a *different* manner than that prescribed in the Act. To have appointed and commissioned District Judges and District Attorneys, without the creation and organization of a District Court, *by law*, in which those officers could have performed their appropriate functions and duties as such officers, and without any compensation having been provided for their services, would have been a *useless* and unprofitable ceremony, not contemplated by the Constitution.

But it is said, that when the District Court was created and organized, by the Act of 1870, the office of the District

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Judge of the District Court and the office of District Attorney for *that Court* were *vacant*, and that the Governor had the power, under the second section of the fourth Article of the Constitution, and the sixty-sixth section of the Code, to fill such vacancy, *without the advice and consent of the Senate*. That section of the Constitution declares that "when any office shall *become vacant* by death, resignation or otherwise, the Governor shall have power to fill such vacancy, unless otherwise provided by law; and persons so appointed shall continue in office until a successor is appointed, agreeably to the mode pointed out by this Constitution, or by law, in pursuance thereof." The answer to this suggestion and the argument in support of it is, that the Constitution does not confer the power on the Governor to *assume* that an office in a Court, created and organized *by law* for the first time, and which never had any *prior existence* or prior incumbent to fill it, is a *vacant* office, according to the true intent and meaning thereof. But, on the contrary, the Constitution contemplates that the District Court shall be created *by law*, and, when so created *by law*, then it is made the duty of the Governor to complete its *organization* by the appointment of District Judges and Attorneys therefor, *with the advice and consent of the Senate*, in accordance with the provisions of *that law*, if consistent with the Constitution, and *not otherwise*. The Constitution does not declare that an office in a newly created Court *by law* which had no power, existence or prior incumbent in it, is a *vacant* office; and therefore the Governor could not appoint an officer for that *newly created Court* in any other manner than that prescribed by the Constitution and the law organizing it, (to-wit:) *with the advice and consent of the Senate*. The Constitution confers the power on the Governor to make appointments to fill vacancies in offices which have had a *prior existence*, and been filled by a *prior incumbent*, when such offices *become vacant* by the death of the incumbent, or by his resignation, or otherwise, without the advice and consent of the Senate, such

appointment to continue only until the assembling of the Senate. The words of the Constitution are, "when any office *shall become vacant*," etc.; not where any office is *vacant* because it never had any legal existence or incumbent in it, as is claimed in this case. Before an office in the District Court could *become vacant*, in the sense those words are used in the Constitution, that Court must necessarily have had a prior legal existence: for if there was *no such Court* there could not be any *vacant office in it*. The Constitution most clearly contemplates that the officer *whose vacancy* the Governor is empowered to fill by appointment, as claimed, must have been one who was *originally appointed* to the office, in accordance with the requirements of the Constitution and laws of the State, and *subsequent* to such lawful appointment the office *becomes vacant* by the death or resignation of the incumbent, or other cause not specially enumerated, which makes the office *become vacant* on account of the indisposition or inability of the prior incumbent, to perform the duties of it. Neither the words nor spirit of the Constitution authorize the exercise of the power claimed for the Governor in behalf of the defendant in error in this case.

But there is another insurmountable difficulty in the way of the defendant in error. The Act of 1870, is an Act to *organize* "the District Court," and that Act expressly provides, that *that Court* shall be organized by the appointment of the District Judge and attorney, by the Governor, *with the advice and consent of the Senate*, and hold their offices for a period of *four years*. This Act contemplates an *original appointment* of the District Judges and attorneys of the District Court, for the term of *four years*. The appointment of the District Judges, and District Attorneys, by the Governor, *with the advice and consent of the Senate for four years*, is an *indispensable* requirement of the Act to perfect a *legal organization* of the "District Court," and, therefore, *that Court* has never been organized in accordance with the terms and requirements of that Act, inasmuch as the appointment of

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the officers of that Court have not been made in the manner prescribed by the Act, so as to make it a *legal organized Court* in conformity with the express requirements thereof; for it will not do to say that the Governor could *assume* that the "District Court" had been legally organized in any manner *different* from that prescribed by the Act of 1870, and then proceed to fill the offices of that Court, as *vacant offices*, under the 4th paragraph of the 2d section of the 4th Article of the Constitution, when, in fact, the District Court had not been *organized*, as required by the Act of 1870, and thus making it impossible that any office in that unorganized Court could *become vacant*, as contemplated by the Constitution. Before any office in the "District Court" could *become vacant*, so as to authorize the Governor to fill it under the Constitution, as claimed, *that Court* must have been legally organized by the appointment of the Judges and attorneys thereof, by the Governor, with *the advice and consent of the Senate*, for a *period of four years*, as expressly required by the Act of 1870. Then, if either of said offices in said Court had thereafter *become vacant*, by the death, resignation, or otherwise, of either of the officers of said Court so appointed, as required by the Act organizing *the Court*, the Governor would have had the power of appointment, under the Constitution, to fill such vacancy until the meeting of the next General Assembly, but not otherwise. The 66th section of the Code only authorizes the Governor to fill all vacancies as contemplated by the Constitution and laws of the State. The radical error of the argument in support of the legality of the appointment, made by the Governor, of the defendant in error, as District Attorney of the District Court, is the *unauthorized assumption* that the District Court was created and organized by the Constitution; whereas, there was *no judicial power* vested in that Court by the Constitution, until it was "established by law," as provided in the Act of 1870, as is most clearly demonstrated by reference to the 1st section of the 5th Article of the Constitution, before cited.

Until the passage of the Act of 1870, such a Court as the "District Court" was not known to, or recognized by either the Constitution or laws of this State as a Court, in which any judicial powers whatever could have been vested or exercised by any officer pretending to officiate therein. The Constitution simply provided for the appointment of District Judges and attorneys, whenever a District Court should be created and organized by an Act of the General Assembly, and defined their jurisdiction, when so appointed, under the provisions of such Act.

The result of the investigation of the question, involved in this branch of the case, therefore, is that until the District Courts were created, and organized *by law*, or in the language of the Constitution, "established by law," there was no judicial power vested in *that Court* by the Constitution, to be administered, performed, or executed by the appointment of either District Judges or District Attorneys, for *that Court*. But when the District Court was established *by law* on the passage of the Act of 1870, then it became the duty of the Governor to appoint the officers of *that Court*, in the manner required by that Act, the same being consistent with the Constitution, not to fill a *vacancy*, because none existed in that *newly established Court*, but to have made an *original* appointment of Judges and attorneys for that newly established Court, for the term of *four years, with the advice and consent of the Senate*, as required by that Act, so as to have perfected the complete organization of the District Court, as contemplated by the Constitution, and as required by the Act of 1870, and not *otherwise*. Until the District Court had been *organized* by the appointment of the officers thereof, as required by the Act of 1870, there was no office in *that Court* which had *become vacant* in the sense and meaning of the Constitution, which would authorize the Governor to fill it as a *vacant office*. The appointment of the defendant in error as District Attorney of the District Court of the Eleventh Senatorial District, by the Governor, under the

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statement of facts disclosed by the record, was not only without authority of law, but in express violation thereof, as prescribed by the Act of 1870.

The next question to be considered is whether the Act of 28th October, 1870, organizing the District Court, is a legal and valid law, according to the provisions of the Constitution of 1868. This is the first time this question has been presented to this Court for adjudication, and it has received that consideration which its importance demands. By the third Article of that Constitution the legislative power of the State is vested in a General Assembly, consisting of a Senate and House of Representatives. By the third paragraph of the first section of the third Article of that Constitution, it is declared that "No session of the General Assembly, after the second, under *this* Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof." By the thirty-second section of the first Article of that Constitution, it is declared that "Legislative Acts in violation of this Constitution are void, and the Judiciary *shall so declare them.*" The first inquiry to be made is, whether the Act purporting to be an Act of the General Assembly, passed on the 28th of October, 1870, organizing the District Court, was passed at a session of the General Assembly *after the second session thereof*, under the Constitution of 1868. The *first* session of the General Assembly under *that* Constitution, as appears from the published Journals thereof, commenced in July, 1868, and adjourned *sine die* on the 6th day of October, 1868. The second session of the General Assembly under that Constitution commenced on the 13th day of January, 1868, and adjourned *sine die* on the 18th day of March, 1869. The third session of the General Assembly under that Constitution, commenced on the 10th day of January, 1870, and was adjourned by the proclamation of the Governor on the 25th day of October, 1870. In *Foster vs. Daniels*, (39 Georgia Reports, 40,) this Court *unanimously* held and decided that the

Constitution of 1868 took effect and went into practical operation in this State on the 21st day of July, 1868. The sessions of the General Assembly of the State of Georgia held in 1868, 1869 and in 1870, were *necessarily* held under the Constitution of 1868, which the members thereof took an oath to support, and could not have been held under any *other Constitution*, as the General Assembly of the people of Georgia. The Judges of this Court, whose offices were created by that Constitution, were appointed and confirmed by the Senate of the General Assembly at its session in 1868, under *this Constitution*; for *that purpose*, at least, it has been recognized as a session of the General Assembly under *this Constitution*, and for *that purpose* it is presumed that the session of 1868 will continue to be recognized as a session of the General Assembly under *this Constitution*. If the session of the General Assembly in 1868 was a session under *this Constitution* for *that purpose*, why was it not a session under *this Constitution* for all *other legitimate purposes*, and to be counted as such? The truth is, and such is the historical fact apparent on the face of the public records of the State, that the session of the General Assembly held in 1868 was the *first* session thereof held under the Constitution of 1868; that session of the General Assembly enacted laws under *this Constitution* for the government of the people of Georgia, imposed taxes on them under *this Constitution*, and passed an Act to lay off a homestead under *this Constitution*; shall they now be told that the session of 1868 was not a session of the General Assembly under *this Constitution*? The stubborn facts contradict the unauthorized assumption. The session of the General Assembly, then, which met on the 10th day of January, 1870, was the *third* session thereof under the Constitution of 1868, and consequently was a session *after the second*, under that Constitution. The second inquiry to be made is, whether the Act in question was passed after the expiration of forty days from the commencement of the third session of the General Assembly, and, if

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so, whether that session was prolonged by a vote of *two-thirds* of each branch thereof, as required by that Constitution. By reference to the Journals of the General Assembly, as published, which this Court is bound to recognize under the provisions of the 3762d section of the Code, the third session of the General Assembly under the Constitution of 1868 was commenced on the 10th day of January, 1870. The Act in question is dated on the 28th day of October, 1870, more than forty days after the commencement of the *third* session of the General Assembly under the Constitution of 1868. After a careful examination of the Journals of the General Assembly, it nowhere appears therefrom that the time was prolonged by a *two-thirds* vote. Indeed, it was not contended on the argument that the session was prolonged by a *two-thirds* vote, as required by the third paragraph of the second section of the third Article of that Constitution. The Constitution of the State is the *organic* law thereof, which creates the several departments of the State government, and limits and defines the powers and duties of each department thereof, the Executive Department, the Legislative Department and the Judicial Department. The Legislative Department of the State government has no power or authority to enact laws or to perform other legislative acts for the government of the people in any *other manner* than that prescribed by the Constitution, and if it shall do so, such pretended laws or other acts are *not binding on the people*, but are void, and it is expressly made the duty of the Judicial Department of the government to so declare them in all cases, except as to the election returns and qualifications of the members of the General Assembly; each House thereof is made the *exclusive judge* of those questions, by the fourth section of the third Article of the Constitution. The limitation of the time of each session of the General Assembly, as prescribed in the Constitution, was a wise one, intended for the protection of the people against unnecessarily prolonged, expensive sessions of the General Assembly. "No session of

the General Assembly, after the second, under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof," is the *mandatory* language of the Constitution. It necessarily follows, therefore, that all pretended laws purporting to have been passed by the General Assembly at its *third* session in 1870, after the expiration of forty days from the time of the commencement of that session are void, unless it is clearly shown that the session was prolonged for a longer period than forty days, by a vote of *two-thirds* of each branch thereof, which it was not pretended was done, and the Journals of the two Houses furnish no evidence of that fact. And the legal presumption is that no such vote was taken, inasmuch as each House is required, by the Constitution, to keep a Journal of *its proceedings*, and to have the yeas and nays recorded thereon, as to all questions requiring a two-thirds vote, and publish it immediately after adjournment. The *mandatory* language of the Constitution is clear and explicit, that "No session of the General Assembly, after the second, under this Constitution, shall continue longer than *forty days*, unless prolonged by a vote of two-thirds of each branch thereof;" and it is equally binding on Governors and governed, legislators and people, and the Judges of the Courts. This clause of the Constitution is and was intended to be as binding and obligatory on the Legislature, Executive and Judicial Departments of the State government as any other clause thereof, and cannot be *ignored* without a *palpable violation* of it.

It is said, if there is any *reasonable doubt* as the validity of a law under the provisions of the Constitution, it is the duty of the Courts to decide in favor of its validity. But what is a conscientious Judge to do when he has *no grounds* on which to base such a doubt? If I should declare that I *doubted* the fact of my own existence, or that two and two made four, the *sincerity* of that doubt might well be questioned. So, if I should declare that I *doubted* as to what are the clear words and meaning of the Constitution before

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recited, or that it was the *third* session of the General Assembly under the Constitution of 1868, which pretended to enact the law in question, or that it was passed after the expiration of forty days without a two-thirds vote of both branches of the General Assembly to prolong the session, or that the State was legally reconstructed under that Constitution on the 21st day of July, 1868, as was unanimously decided by this Court, in *Foster vs. Daniels*, then the *sincerity* of all such doubts might also well be questioned, for the simple reason that there are *no grounds* on which to base such doubts. If I should express *doubts* as to the plain unambiguous words of the Constitution, or as to what was the true intent and meaning thereof, or as to the fact that the session of the General Assembly of 1868 was held under the Constitution of 1868, or whether the mandatory requirements of the Constitution had been complied with, so as to make the pretended Act of the General Assembly, now in question before the Court, a valid law in pursuance of that Constitution, such expressed doubts, on my part, in view of the plain facts of the case, however *plausible* the pretexts therefor might be, would be open to a *searching criticism* by the people of the State, whose fundamental law, intended for their protection, has been so *flagrantly* and *recklessly* disregarded in the pretended enactment of the Act of 1870, organizing the District Court. The question is not who *called* the General Assembly of the State of Georgia to hold its session in 1868, or who administered the oath to its members, but the question is, under what *organic law of the State* did the General Assembly thereof hold its sessions in 1868, 1869 and 1870. Did the General Assembly of 1868 hold its session under the Constitution of 1868, and if not, under *what Constitution* was that session held? If the General Assembly of 1868 *did* hold its session under the State Constitution of 1868, then that was its *first* session under that Constitution. It is an indisputable fact, that the officers of the State, created by that Constitution, including the Judges of this Court, as

well as the Judges of the Superior Courts, were appointed and confirmed by the Senate of the General Assembly at its session in 1868, under *this* Constitution. It is also an indisputable fact that the people of Georgia have been taxed to pay the expenses of that session of the General Assembly under *this* Constitution. The question recurs, was the session of the General Assembly in 1868 held under the Constitution of 1868? In view of the plain incontrovertible historical facts, well known to our entire people, to *state* the proposition, is to *decide it*.

But it has been said that this is a *political* question of which the executive and legislative departments of the government are the judges, and not the judicial department. That argument amounts simply to this: that, although the executive and legislative departments of the State government may *usurp* power and exercise authority not conferred on either of them by the Constitution, still, as *such usurpers*, they are the exclusive judges to determine the validity of *their own usurpations*, whenever the individual rights of the citizens of the State are injuriously effected thereby. Such is *not the fundamental law of the people of Georgia*. Their Constitution expressly declares that legislative acts in violation of their Constitution, or the Constitution of the United States, are void, and *the Judiciary* shall so declare them. The Constitution of the people of Georgia does not contemplate that the executive and legislative departments of the government shall be the judges of *their own usurpations* in the pretended enactment of laws for their government, in *violation* of that Constitution. This duty is expressly devolved on the *judicial* department of the State government; and whenever the officers of that department shall fail or neglect to perform their appropriate functions and sworn duties, in regard to *such usurpations*, the people of the State will have no legal protection for their persons or their property, as they may soon discover, to their *irreparable injury* and damage. If the Constitution of the State is not to be observed and regarded in the

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enactment of laws for the government of the people thereof, then there is no *practical* use or benefit resulting to them in having a Constitution, limiting and defining the powers and duties of their agents created by it. Vattel, that eminent civilian, has *truthfully* said, that "to attack the Constitution of the State, and to violate its laws, is a *capital crime against society*, and if those guilty of it are invested with authority, they add to this crime a *perfidious abuse of the power with which they are entrusted*." This Court, in *Solomon vs. Commissioners of Cartersville* (41 Georgia Reports, 157,) *unanimously* decided that an act of the General Assembly, which was not signed by the Governor within the time prescribed by the Constitution, was *not a binding law*. In that case this Court said: "The Constitution of the State is the fundamental law of the State, and if bills introduced into the General Assembly are not passed and approved in accordance with the requirements and provisions of that Constitution, they have no binding force or authority upon the people thereof as *laws*." In view of the obligation imposed on me as a judicial officer, to support and maintain the Constitution of the State, and for the reasons heretofore expressed, I am of the opinion that the judgment of the Court below, in this case, should be reversed on both the grounds specified in the bill of exceptions.

KENT & COMPANY, plaintiff in error, vs. L. T. DOWNING,
• assignee, defendant in error.

The same parties *vice versa*.

Where there was an attachment pending in the Superior Court of Muscogee county against A, who was declared a bankrupt, and his assignee was appointed under the laws of the United States:

1. *Held*, That the assignee may be made a party to the attachment, and that it was proper, on his motion, to declare the attachment dissolved by the bankruptcy.

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2. *Held further*, That pending such motion, the plaintiff in attachment may amend his attachment as in other cases.

3. When an attachment was issued on the 12th of August, 1870, and was, by mistake, made returnable to the May term, 1871, instead of November, 1870:

Held, That, on the mistake being made apparent to the Court, the attachment and bond may be returned, if the return was in fact made to the November term, 1870.

Bankruptcy. Amendment. Practice. Before Judge JOHNSON. Muscogee Superior Court. November Term, 1870.

On the 12th of August, 1870, Kent & Company's attorney made affidavit and bond to procure an attachment against R. F. Duran. In the bond he said: which attachment is returnable "to the May Term of the Superior Court of said county." The Magistrate ordered the officer to levy and make return "to the May Term of the Superior Court of said county." It was levied at once upon certain perishable property, and the Court ordered it to be sold. In this order the attachment is said to be "returnable to the November Term of the Superior Court."

At November Term, 1870, Downing appeared, showed that Duran had, within four months from the issuing of said attachment, been adjudicated a bankrupt under the Bankrupt Act of Congress of 1867, and that he, Downing, had been appointed his assignee and had qualified as such, and moved to be made a party-defendant as assignee. Plaintiff's counsel objected to this, but the Court overruled the objection.

Becoming a party, Downing moved to dismiss the attachment because it was not returned to November Term, 1870, as required by law. The plaintiff's counsel stated that

"November" by mistake, both in the proposed to amend them by striking "November."

dismiss the attachment or to allow in his opinion, the bankrupt pro-

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ceeding stopped the cause in his Court, and he could do no act in the premises. Downing then moved to have said attachment entered as dissolved. For the same reason the Court refused this also.

Each side sued out a bill of exceptions. Kent & Company complain at Downing's being made a party, and at the refusal of the amendment. Downing complains that the Court would not dismiss the attachment nor enter it dissolved.

The cases were here treated as one.

PEABODY & BRANNON, for Kent & Company, said the attachment was dissolved, and, therefore, no party should have been made: 40 Ga. R., 162; Bankrupt Act 1867, secs. 14, 21. The amendment should have been allowed: Acts, 1855-6, p. 38; R. Code, secs. 3454, 3456, 3240; 29 Ga. R. 644; 36th, 90; 37th, 24; 26th, 431; 35th, 269.

R. J. MOSES, for Downing, assignee.

McCAY, Judge.

1. If an attachment be in fact pending in the Courts of this State, and the defendant be declared a bankrupt, the attachment is, by the Act of Congress, dissolved: Act of 1867, section 14. But how is the State Court to know that the defendant is a bankrupt? Surely the judgment must be, in some authentic mode, made known to the Court. It may be denied. It would be a strange law if, *ipso facto*, by the fiat of bankruptcy, attachments in other Courts fell to nothing, so as to make the officers of said Courts trespassers. Order is one of the first requisites of legal proceedings, and we do not see how our Courts can take notice of judgments of other Courts by instruction. They must be brought to the notice of the Court, and this cannot be done without parties. We think, therefore, it was proper to make the assignee a party on his own motion, if for no other reason

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than to have it properly made known to the Court that the defendant was a bankrupt.

2. We think, too, the assignee had a right to move to dismiss the attachment. If its levy gave the defendant any rights under the attachment bond, that passed, under the law, to the assignee, he has the right to use the means to make them effective, by dismissing the attachment.

3. We are clear, however, that the bond and attachment were amendable. The Code, section 3240, authorizes amendments of the bond and attachment. The amendment here was clearly only to correct a clerical error. It appears that in fact the attachment was returned to November Term, 1870. This was patent to the Court, and the amendment was only to make the statements in the attachment and bond conform to the facts.

Judgment reversed.

MARY H. DILLARD, plaintiff in error, vs. THE MANHATTAN
LIFE INSURANCE COMPANY, defendant in error.

[When this cause was called, Lochrane, Chief Justice, stated that he was a policy holder, and consequently a stockholder in said Company, and interested, but upon request of counsel he presided.]

When a wife insured the life of her husband in 1859 with an agent of a New York Insurance Company, and paid the annual premiums promptly until 1862, but then failed to pay said premiums until March, 1865, when the husband died, after which, and after the close of the war, she tendered the unpaid premiums, and demanded payment of the sum insured, alleging that she was prevented by the war and by Act of Congress from paying them year, by year, on the day fixed in the policy.

Held, that the contract of the company for any future risk was dependent upon the payment of the annual premiums as they, severally, by the assessment, were to be paid, and the failure to pay, for whatever reason, could not be remedied by a tender of the premiums after the death of the person, whose life was insured.

Dillard *vs.* Manhattan Life Insurance Company.

Insurance. War. Conditions, etc. Before Judge JOHNSON. Muscogee Superior Court. May, 1871.

Mrs. Dillard's suit against the Manhattan Life Insurance Company, of New York, contained the following material averments: On the 26th of April, 1859, she paid the agent of said company, in Columbus, Georgia, where he and she lived, \$141 00, as a premium, in consideration of which and of the like sum to be paid annually thereafter, with interest thereon, during the life of her husband, then living in Columbus, Georgia, said company insured the life of said husband in the sum of \$5,000 00, for her sole benefit, said sum to be paid at his death, upon due notice, etc. There were in said policy various conditions upon which it was to become void. One of them was if the husband should enter "into any military or naval service whatever, the militia not in actual service excepted." Another was, if Mrs. Dillard "should not pay the said premiums on or before the day hereinbefore mentioned for their payment." It further stipulated that when said policy should cease or be or become void, all prepaid premiums should be forfeited to the company.

She promptly paid the premiums and interest which fell due prior to the 26th of April, 1862. Before that day, war was raging between the United States and the Confederate States. Georgia was one of the Confederate States, and she and her husband were resident in Georgia. By this war and the law she was prevented from paying said premiums and interest during said war. While the war continued, to-wit: on the 27th of February, 1865, her husband died a natural death, without having violated any condition in said policy. The understanding and intention of herself and said company as to the meaning of the condition as to entering military service, etc., was only that her husband should not voluntarily, of his own accord, without constraint of law, so do. And he never did so. True he was appointed Brigade Post

Quartermaster at Columbus, by President Davis, in October, 1862, and he accepted said appointment to avoid conscription, to which he was, by law, then subject, and thereby he lessened instead of increasing the company's risk.

As soon as the war ended, she offered to pay said company the unpaid premiums and interest then due, complied with the conditions of said policy as to proof of death, etc., as nearly as could be, and demanded payment of the policy. The company refused to pay her, claiming that the policy was of no force, by reason of the promises.

Upon demurrer this cause was dismissed. That is assigned as error.

H. L. BENNING; JAMES M. RUSSELL, for plaintiff in error. The war excused payment of premiums: Wheat. Int. Law, 379, 385, 392; 1 Kent's Com. 74, 76, 77; Ch. L. of N., 82, 84. Wildman's Int. L., 8, 15; Vattel, 320; 13th Ves., 71; 40th Ga. R., 302, 60; 2 Com. Dig., Chancery obligations, (4 D., 10.) Act of God or the law making compliance impossible, suspends operation of the conditions: Coke Litt., 206 a; 34th Ga. R., 207, 548; 40th, 60; Ch. on Con., 630; *Wallace vs. Sanders*, last term. When the war ended, the contract revived: Com. Dig., Chancery obligations, (4 D., 10,) citing R. Ca. ch. 72. Being in military service was no breach, because it was compulsory: Burrows L. Assurance, 68, 69; Brown's L. Max., 259; Coke Litt., 42, 183. Agreement not to fight for one's country, void: R. Code, sec. 2681. *Verba chartarum fortius accipiantur contra proferentem*: Br. L. Max., 254; R. Code, sec. 2715, p. 4; 1 Barr 341 349. Conscrip. Acts passed the 6th of April, 2—their force: 34th Ga. R., 31, lace did not increase risk and is 2801, 2819; 5th Ga. R., 184; s R., 23; 34th Ga. R., 145. If : 2 Coke Litt., 206 a; 34th Ga. l. on C., 630. Penalty, relieved

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from by subsequent performance: 2 Story Eq., sec. 1320, *et seq.*; 12 Ves. R., 289; R. Code, sec. 3060; 1st Bro. Ch. C., 418, etc.

SMITH & ALEXANDER, for defendant. The contract is based on payment of premiums: R. Code, sec. 2752; 1st Phil. on Ins., 2, and works on insurance *passim*. Non-payment made contract void for want of consideration. Once bad never good without consent. After death too late to pay premium: 8th Ga. R., 534; 5th Tenn. R., 695; 12th East's R., 183. By contract his entering military service avoided the policy; it increased risk; Emengon, 4, 13, 51; Aug. on F. Ins., 235, 334; 1st Arn. on In., 2, 3.

McCAY, Judge.

We recognize fully the general doctrine contended for by the plaintiff in error. It would have been *illegal* for Mrs. Dillard to pay the premium to the company during the war, contrary to Act of Congress. And were this a case of a *forfeiture* for the failure, we should hold that the *forfeiture* was prevented by the illegality of the performance of the condition. But is this such a case? The company contracts to pay so much at the death of the insured, if the annual premiums are paid as stipulated. It is clear from the policy and from the known practice of all companies, that the insured has a right at any time to refuse to pay and give up his policy. The contract, upon its face, requires to be renewed from year to year by the payment of the premium. Indeed, a contract of life insurance is, at best, nothing but an undertaking that the company will take the annual premiums paid, invest them safely, and pay to the insured the product, after deducting the expenses of the business. Indeed, if every person insured lived to an average age, this would be exactly the contract. But as any individual may die at any time, the company agrees to pay him what his premiums *would amount to*, making up its losses on him by

the payments of those who live beyond the average age. The regular annual payment of the premium agreed upon is thus a condition *precedent* of the contract, and not a condition subsequent. And it is just here that the authorities relied upon fail to apply. If a condition subsequent become illegal, there is no forfeiture; for the estate having once vested, it shall not be divested because the party fails to do an illegal or impossible act: Code, section 2680. But it is different with a condition precedent. If that be illegal the right never vests. It is not a question of forfeiture, but a failure to do the thing necessary to acquire the right: Brown's Legal Maxims, page 176. And this, as it seems to me, is a distinction based upon principles of justice and sound sense.

If I promise a man to sell him my house, provided he appear, on a particular day with the money, and he fails for whatever reason other than my fault, he has no right in the house. But if I sell him the house, and it is agreed that he shall forfeit it if he fail to pay me for it in full by a particular day, then the *cause* of his failure may, both in equity and sound sense, become very material.

We are very clear that, as the case is made by the record, the judgment is right.

Judgment affirmed.

SWIFT, HAMBERGER & COMPANY, plaintiffs in error, vs.
A. H. POWELL, defendant in error.

1. Where A agreed with B to deliver one hundred bales of cotton, at twenty-one cents per pound, to him, at any time within sixty days, and B knew that A expected to purchase himself to fulfill his contract, and the contract was reduced to writing, and recited that it was for value received, and the parties further agreed to put up \$1,000 each, which they did, to cover the losses of such contract:

Held, That, inasmuch as the original contract was reduced to writing, and recited a consideration, we hold there was sufficient, under the

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facts, to take the contract out of the illegality of such contracts under section 2596 of the Code, and that the \$1,000 put up were to be regarded as stipulated damages, and the plaintiff could recover no more than the amount.

2. When the Court, upon the trial, from a misconception of the law of the case, misdirected the jury, and admitted illegal evidence of consequential damages, but upon motion granted a new trial:

Held, That it was not error in the Court to have granted the new trial, especially as the verdict was for an amount not authorized by law."

Contracts. Wagers. Stipulated Damages. Before Judge COLE. Bibb Superior Court. October Term, 1870.

This case was bottomed upon the following writing :

"MACON, GEORGIA, December 3d, 1868.

"For value received, we hereby pledge, bind and obligate ourselves, our heirs, executors, administrators and assigns, to receive of A. H. Powell one hundred bales of upland cotton, to average Liverpool middling, at twenty-one (21) cents per pound, at any time within sixty days from the above date, at the option of said Powell. Cotton to be delivered in the city and paid for in currency on delivery of warehouse receipts to C. A. Nutting, president City Banking Company.

SWIFT, HAMBERGER & Co."

"For value received, I hereby pledge, bind and obligate myself, my heirs, executors and assigns, to deliver one hundred bales of Liverpool middling cotton, according to the above contract. Macon, Georgia, December, 1868.

ADOLPHUS H. POWELL."

On it was indorsed, "Liverpool middlings are understood to be the best middling upland cotton in this market."

Powell did not deliver the cotton, and Swift, Hamberger & Company sued him upon said obligation. They averred that, to meet their obligation, they deposited \$1,000 00 in said bank, when the contract was made, and "at other times within the said sixty days made other deposits of several thousand dollars, and arranged with said Nutting to ad-

vance" what else might be necessary, upon delivery, to pay for the cotton, of which Powell had notice. Such cotton was worth twenty-eight cents per pound at the end of said sixty days. They lost the seven cents profit. They purchased said cotton for manufacturing in their factory, and, for want of it, and by the loss of the use of their money, they were damaged in all \$5,000 00.

Powell pleaded that he had no cotton, but expected to buy to meet said obligation; that plaintiffs knew it; that plaintiffs paid him nothing as part of the consideration of said contract, nor did any of their skill or labor enter into said consideration. Further, that immediately after the execution of the contract, the parties thereto agreed that each should deposit \$1,000 00 in said bank, and that the failing party should lose the deposit and forfeit it to the other; this sum was deposited; it was the stipulated damages for non-compliance, and plaintiffs can have said deposit by Powell on demand.

After the writing was read in evidence, Hamberger testified as follows: Plaintiffs were manufacturers of cotton goods; he came to Macon to buy cotton for manufacturing, and made said contract for that purpose, and not for speculation. Plaintiffs deposited some money ("nearly enough") with Nutting, and arranged with him to pay any balance if the cotton was delivered. The cotton was not delivered. It would have weighed four hundred and seventy-five pounds, and was worth, at the end of said sixty days, twenty-eight cents per pound. Plaintiffs closed.

Powell testified that just after said written agreement, plaintiffs' agent and himself (who made the first) entered into the said agreement as to a deposit of \$1,000 00 "as a forfeit," and pursuant thereto each deposited \$1,000 00 in said bank then and there, with the writing, which was also left in the bank. This deposit was intended to cover any loss which might result from the speculation, or as a forfeit for not carrying out the agreement first made. When the

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obligation matured, he notified plaintiffs that he would forfeit said \$1,000 00. The plaintiffs' contracting agent knew that he did not have any cotton but expected to buy to meet his obligation. Plaintiffs expended no labor nor skill, nor undertook to do so, nor expended or paid any money as a consideration for said contract, "except the putting up of the \$1,000 00" aforesaid. It was a pure speculation between him and plaintiffs; he knew plaintiffs both as manufacturers and speculators. Defendant closed.

Hamberger testified that the writing was drawn up, and before it was signed Powell proposed that each should deposit \$1,000 00, "to make good their words;" he agreed, they went to the bank, signed the contract, deposited \$1,000 00 each, and the contract together, in the bank; nothing else was said about this deposit. Had he not made this contract he would have bought cotton to supply the factory; it was then worth but twenty-one cents per pound in Macon, and there was enough there. Plaintiffs are not cotton speculators. (By Powell's non-compliance the factory was stopped for a month, to plaintiffs' damage \$500 00, in the loss of the profits which would have been made had the factory run during the month.) This evidence in brackets came in over defendant's objection. Another witness testified that he thought the contract was not signed when the parties started to the bank to make the deposit of \$1,000 00 each.

The Court charged the jury: 1st. If defendant contracted with plaintiffs to deliver them one hundred bales of cotton within sixty days, at twenty-one cents per pound, and if, at the time, defendant did not have the cotton, but expected to buy it, to fulfill said contract, and plaintiffs were aware of that fact, and if no expense on the part of the plaintiffs entered into the consideration of the contract, plaintiffs cannot recover. But if the plaintiffs, in order to carry out said contract on their part, deposited money after the making of said contract at said bank, which money was kept by plaintiffs on deposit to pay for said cotton when delivered, then

plaintiffs were put to such expense as made the contract good, and plaintiffs can recover. To make a contract for the sale of goods to be delivered at a future day, when both parties know that the seller expects to purchase to fulfill his promise, good and valid, it is sufficient if expense alone, on the part of the buyer, enters into the consideration; and a deposit of money by the buyer to meet said contract, together with the loss of the use of said money while so deposited, constitutes such expense. It is not necessary for plaintiffs to show that either skill or labor on their part entered into the consideration of the contract, but if they prove that they were put to expense, as already explained, it is sufficient. If defendant was suing for a breach of the contract he would have to prove that skill and labor entered, on his part, into the consideration, in order to recover. 2d. If, after plaintiffs and defendant made the contract for the delivery and purchase of the cotton, they deposited \$1,000 00 each, and agreed that the sum so deposited should cover all damages that the party violating the contract should be liable for, plaintiffs could recover \$1,000 00. But if the deposit was made by the parties to bind the bargain, or as part of the consideration of the purchase, plaintiffs are entitled to recover whatever damages the jury believe they sustained by the non-delivery of the cotton. 3d. If the verbal agreement as to the deposit of \$1,000 00 by each was not made after the execution of the contract in writing, they should not consider the verbal agreement at all.

He gave no other charges upon said points. The verdict was for plaintiffs for \$2,800 00 besides interest. Defendant's counsel moved for a new trial upon the grounds that the verdict is contrary to law, etc., and because the Court erred in each of said charges. A new trial was granted upon the ground that the Court had erred in the charges. This is assigned as error.

NESBITS & JACKSON, for plaintiffs in error.

LANIER & ANDERSON, for defendant.

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LOCHRANE, Chief Justice.

This case came before the Court upon exception to the judgment of the Court granting a new trial. We affirm the judgment of the Court below, as we are of opinion that his conception of the law of the case, as submitted in his charge to the jury, was erroneous as to the principles of law governing the case, and it was his duty to have granted the new trial. The written instrument entered into between the parties reciting a consideration for the agreements entered into, lifted the case, in the opinion of the Court, out of the operation of the Code, section 2596, and gave to it the effect of a legal and binding contract, which Courts would recognize and enforce.

And the stipulation that the parties were to put up \$1,000 00 each to cover any contemplated losses arising out of non-compliance, in our opinion, was an agreement fixing the losses by the sum stipulated to be paid. And in a suit brought for damages arising out of the non-performance of the contract, no more than this agreed sum could be legally recovered.

Judgment affirmed.

ENOCH F. COLLINS *et al.*, plaintiffs in error *vs.* A. P. COLLINS *et al.*, executors, defendants in error.

1. When in 1868, A sold to B two negro slaves for \$5,000 00, payable in pork at \$1 00 per pound and in cotton at fifty cents per pound, but no note was taken, and soon after \$2,000 00 was paid in pork according to the contract, and afterwards, A having died, his executors, after the 1st June, 1865, adjusted the debt with B, fixing the amount due at \$1,700 00, part of which was then paid, and B's note, with C as security, taken for the balance:

Held, That this was not a mere renewal of the old debt, so as to bring it within the Relief Acts of 1868 or 1870. But as there was, in fact, no new consideration, and the party introduced was only a security, the

note was still for slaves, and it was error in the Court to charge the jury that there had been such a novation as to purge the debt of its slave consideration.

2. Where there was evidence on one side that the consideration of a note was the price of a slave, and on the other, that it was given in settlement of a dispute about the title to twelve bags of cotton, it was the duty of the Court to charge the jury as to the law arising under the proof, under the evidence of both sides.

Slave debts. Novation. Relief. Before Judge COLE.
Bibb Superior Court. October Term, 1870.

On the 24th of August, 1866, Enoch F. Collins, and Stephen Collins as his surety, delivered their promissory note for \$500 00 of that date, and due twelve months thereafter, payable to A. P. & O. C. Collins, executors, with interest from date. A. P. & O. C., as executors of Charles Collins, sued Enoch F. and Stephen on said note. They pleaded that the consideration of said note was slaves sold by said Charles to said Enoch F., in November, 1863; that this was a renewal of the old obligation, and that Enoch F. had lost \$5,000 00 by emancipation of his slaves by the war. When the cause was called, defendants objected to the trial of the cause because no affidavit of taxes being paid was filed as required by the Relief Act of 1870. The Court, after hearing their version of the facts, ordered the trial to proceed. The plaintiffs read in evidence the note and closed. Enoch F. and Stephen testified, that in the fall of 1863, Enoch F. bought of Charles two slaves at \$5,000 00, Confederate valuation, to be paid for in pork at \$1 00 per pound, as much as he chose, and partly in cotton at fifty cents per pound. He paid \$1,900 00 or \$2,000 00 in pork that winter; never paid the cotton; no note or other writing was made. But, after Charles' death and since the war, Enoch F. and said executors estimated the value of said debt in United States currency at \$1,700 00. Enoch F. paid them \$700 00 and gave them two notes for \$500 00, one of which was paid, and the other is the one sued on. No cotton was

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delivered to Charles, nor did Enoch F. have any cotton belonging to him, nor did he settle for any cotton, but renewed said old demand as aforesaid.

The executors claimed that Enoch F. had twelve bales of cotton belonging to Charles, and sued out a possessory warrant for them. This was decided against the executors, and then they brought trover for said twelve bales of cotton. Enoch F. afterwards, being about to move to Louisiana and fearing annoyance, got Stephen to arrange the settlement as aforesaid. Enoch testified that one of the said slaves died during the war; the other was emancipated. Enoch had but ten bales of cotton during the war; he lost \$8,000 00 by the emancipation of slaves. Stephen testified also, that he never received any cotton from Enoch F. for Charles; that, some time during the war, he saw Enoch F. weigh ten bales of cotton, and somebody put down their weights on paper; what became of the paper he did not know. He had no connection with this debt till he signed as security as aforesaid. A. P. Collins testified that he found among Charles' papers a slip of paper containing the weight of twelve bales of cotton, in pencil, but who made the figures he did not know. It had nothing else on it. From that circumstance, and what he knew about the cotton, O. P. Collins called on Enoch F. for it, and he consented to deliver it. When he subsequently refused to deliver it, they tried a possessory warrant and failed; then brought trover and settled that trover suit by \$700 00 in cash and two notes at \$500 00 each, as stated. This settlement was for the cotton and not for any balance due for slaves. When the cotton was demanded it was worth fifty cents per pound. This was supported by O. P.'s testimony, substantially the same. W. Poe testified that he brought the trover action, supposing from what they told him he could recover.

Defendants asked the Court to charge the jury:

1. If Enoch F. became indebted to Charles in 1863 for

slaves, and if said note was given in renewal and not in novation of said debt, plaintiffs cannot recover.

2. The fact that the debt was due to Charles, and the renewal to his executor, does not make a novation by substitution of new parties under section 2682 of the Revised Code.

3. The fact that Stephen became security for Enoch F. in the renewal of the debt for negroes, does not make a novation by substitution of new parties under that section of the Code.

4. If the sale of negroes from Charles to Enoch F. was subsequent to Lincoln's proclamation emancipating slaves, the debt from Enoch F. to Charles was illegal and void and no renewal of the same can give it validity.

5. If this note is a renewal of a contract existing prior to June, 1865, the jury will consider defendant's plea of loss and the proof before them under that plea.

6. If the consideration of slaves is in the contract the fact that some other consideration is also in it does not entitle plaintiff to recover. If the slave consideration is in the note plaintiffs cannot recover.

The Court refused to give any of said charges except the second. He charged that the addition of Stephen, as security to the note, (he having been before in no way interested in, or liable on, the previous contract,) was a novation by substitution of new parties under section 2682 of the Revised Code. The jury found for plaintiffs for \$500 00 and interest. Defendants say the refusal to postpone the cause and the refusal to charge as requested, and the charge as given are errors.

B. HILL; E. F. BEST for plaintiffs in error. This case is covered by Relief Act of 1870: Novation, R. Code, sec. 2682; 40 Ga. R., 487. Lincoln's proclamation under Act of Congress, 1863: 10 Wallace R., 571; Shortrop vs. Macon Circ. C. N. C., N. C. If part for slaves, void: Dudley's R., 161; 1 Kelly, 410; 1 Met., 21; 19 Barb., 291; 4 Allen, (Mass.,) 55.

WHITTLE & GUSTIN for defendant's in error. It was right to try now : Lyon *vs.* Williams, Mar., 1871. Novation, 39 Ga. R., 531 ; 40th, 193, 423, 487 ; R. Code, secs. 2125, 2682. Accord and satisfaction : R. Code, secs, 2827 to 2831. Lincoln's proclamation did not free slaves ; Constitution of 1865 did : 34 Ga. R., 483 ; 37th, 361 ; 13 Rich., S. C. R. Eq., 366 ; 40 Ala. R., 524 ; 4 Cald. Tenn. R., 580 ; 41 Miss. R., 439. If error in charge, the verdict is right anyhow : 37 Ga. R., 94 ; 40th, 423 ; Whitehead *vs.* Arline, present term.

McCAY, Judge.

It would be going very far to say that, in any sense of the evidence, the note sued on was a *mere renewal* of the old one. If this was the mere consideration set up by the plaintiffs, to-wit: the settlement of the suit for the cotton, then it is clearly a debt contracted since June, 1865. But even if the note was only given in settlement of the contract for the purchase of the negroes, this was not a *renewal*. There was a new agreement in any event ; there was a settlement of the *amount* to be paid ; an adjustment of the value of Confederate money ; a change of the specific articles agreed upon into their value in United States currency. This we do not think was a renewal but a new contract, having the old one as a basis and object, but entirely a different contract. We do not think, therefore, that this contract comes within the Act of October, 1870.

2. But, if the defendant's account of the consideration of the note is the true one, we think the *consideration* of this note is slaves, and that the Court erred in not presenting to the jury this view of it.

If the consideration was the settlement of the value of the cotton, as a matter of course the slaves was not the consideration. But, if this note is an adjustment, by the parties, of the amount still due for the negroes, we do not see

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how to escape from the conclusion that the consideration was the negroes.

To make out a case of novation, it is not enough that a new party, who is only a security, has been introduced. Strictly, under the statute, (Code, section 2682) to make a case of novation, the obligation must be due to a new party. At any rate, the old contract must be at an end. As this case presents itself, the payee is the same; the executors stand in the place of the testator, and the old debt is still of force—that is, the old debt as finally settled. The note is only the evidence of it. Nobody has been discharged; the only change of parties has been to add the security, who is a mere gratuitous party, not interested in the consideration.

We express our opinion on the facts. We simply mean to say that, if the defendant's account of the giving of the note be the true one, the consideration of the note is slaves, and they were entitled to have the law presented to the jury in the aspect of the case as presented by the evidence introduced for the defense.

Judgment reversed.

No. 1. GERTRUDE J. WOOLFOLK, plaintiff in error, vs. JOSEPH E. MURRAY, defendant in error.

No. 2. BENJAMIN D. BRYAN, plaintiff in error, vs. C. C. SIMS, defendant in error.

1. When the United States Courts, under the Bankrupt Act of 1869, have acquired jurisdiction of the estate of a bankrupt, the State Courts lose jurisdiction of all claims against him provable under the Bankrupt Act, except specific liens upon his property, and legal or equitable claims of title thereto; and the homestead and exemption provisions of the Constitution of 1868 do not create such a specific lien upon or title to his estate, in favor of his family, as may be heard and adjudicated by the State Courts pending the proceedings in bankruptcy.
2. Whether said claim is such a debt in favor of the family as may be

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proven before the Bankrupt Court, independently of the exemption granted by the Bankrupt law to the bankrupt, it is for that Court alone to decide.

8. The case of *Fannie Lumpkin vs. Eason*, at this term, having been by permission expressly questioned and reviewed, is, after reconsideration, affirmed.

Homestead. Bankruptcy. Before Judge COLE. No. 1. Bibb Superior Court. November Term, 1870. No. 2. Dooly Superior Court. April Term, 1871.

Waiving minor matters, the following are the material facts in these two cases:

No. 1. Mrs. Woolfolk applied for an exemption of her husband's land as a homestead for herself and children, and the cause came before the Superior Court by appeal. Murray, as trustee for her husband's creditors, and certain of the creditors below, and on the appeal, objected to the setting apart of the homestead, upon the following grounds:

1. Prior to her application, the husband was adjudged a bankrupt in the District Court of the United States, and all his property, including this sought to be set apart as a homestead, by order of said United States District Court, passed into the hands of the United States Marshal, and he had it when this application was filed, and before the hearing before the Ordinary, said property had been, according to the Bankrupt Act, conveyed to Murray, as trustee as aforesaid, which conveyance, by relation back, is older than this application, and therefore the Ordinary had no jurisdiction over the matter.

2. Because the husband claimed the exemption allowed him under the Bankrupt Act, and had been allowed the same.

These objections were demurred to. The demurrer was overruled, and that is assigned as error.

No. 2. This was ejectment by Sims against Benjamin D. Bryan, for certain land in said county. It was admitted that defendant was in possession of the premises when the suit was begun, and yet that William Bryan was in possession

and owned the premises on the 19th of December, 1868, and filed his petition to be adjudged a bankrupt on that day, and put this property in his schedule; that his wife knew that he intended making his application in bankruptcy when she filed her petition for exemption of homestead, and that the premises would rent for \$400 00 *per annum*.

Plaintiff read in evidence a deed of assignment from Haselton, Register in bankruptcy, to Holtzclaw, made the 25th of January, 1869, conveying to Holtzclaw, as assignee, all William Bryan's property, which he owned on the 19th of December, 1868. He then read in evidence a deed from Holtzclaw, assignee, to plaintiff, for said premises, made on the day of, 1869, and here the plaintiff closed.

Defendant showed that, on the 16th of December, 1868, William Bryan's wife applied for a homestead, etc., which was granted to her by the Ordinary of said county, on the 28th of December, 1868. It was admitted that Holtzclaw and Sims (the purchaser at his sale) had actual notice, at the time of the sale, that these premises had been set apart to Mrs. Bryan and her children as a homestead; that Benjamin D. Bryan was but her tenant; that she was the real defendant, and that William Bryan was not yet discharged in bankruptcy. Holtzclaw testified that he was not appointed assignee till after the 28th of December, 1868, and gave notice at the sale of this homestead, but stated also that the purchaser would get a good title, and plaintiff bid off the property at \$1,000 00. He further testified that William Bryan had two hundred two and a half acres of land, including his dwelling and out-houses and personalty, worth, in the aggregate, \$2,600 00, allowed to him as exempt by the bankrupt Register.

Defendant's counsel asked the Court to charge the jury, that the judgment of the Ordinary was conclusive as to Mrs. Bryan's rights; that the deed of assignment to Holtzclaw conveyed only the right, title and interest in the property which William Bryan had at the date of his application for bank-

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ruptcy, subject to, and affected by, all the equities and encumbrances existing against it in the bankrupt's hands, and this rule applies to purchasers at his sale. If this property had been set apart as a homestead, before said assignee's sale, the verdict should be for defendant.

The Court charged the jury, that the voluntary taking of the exemption by the bankrupt, under the Bankrupt Act, defeated the wife's right to a homestead; that the petition in bankruptcy being filed first, the Ordinary had no jurisdiction in the premises, and the purchaser at the assignee's sale got a good title against the wife and children. The jury found for the plaintiff, for the premises in dispute, and \$1,200 00 for *mesne* profits. The defendant says that the Court erred in refusing to charge as requested, and in charging as he did.

LYON, DEGRAFFENREID & IRVIN; PHIL. COOK, for plaintiff in error.

LANIER & ANDERSON; HUNTER, JEMISON & NESBIT; NESBITS & JACKSON; S. ROGERS, for defendant. Prior petition in bankrupt Court ousted Ordinary's jurisdiction: Bankrupt Act 1867, by Rice, p. 43; general clause 34, p. 45; clause 46. Exemptions: R. Code, sec. 2013, Act of 1868. All bankrupt's property passed to assignee from date of application: Rice's Manual, p. 49, cl. 63 and 64. Bankrupt law paramount to homestead provisions: U. S. Constitution, Art. VII., sec. 2; State Constitution, Art. XI., sec. 1; James' Bankrupt L., 13; Am. L. Times, January, 1871, 14; 1st B. R., 125, 155; 2d, 1; Phillips vs. Morrison, last term. He elected his exemption: 41st Ga. R., 180; 3d B. R., 142. Ordinary had no jurisdiction: 20 How. R., 601; James' B. L., 13; Gay., 66; 30th Ga. R., 691; 13th, 10; 7th, 362; 12th, 424; 9th Wheat. R., 541; 11th Ga. R., 453; Lumpkin vs. Eason, *ante* this term.

McCAY, Judge.

1. Very clearly, the rights of the bankrupt to an exemption, or rather the quantity of *his* property that *he* is permitted to hold exempt from the claims of the assignee, is to be determined by the bankrupt law and the Bankrupt Court. The jurisdiction of the United States over the subject of bankruptcy, is plenary: Constitution United States, Article I., section 8, paragraph 4. The only doubt there can be, on the facts of this record, is whether our law does not give the wife and family such a specific interest in and lien upon the property of the bankrupt—not for his but for their sake—as is saved by the bankrupt law itself. That law does not pretend to take, as the property of the bankrupt, anything which is not legally and equitably his; nor does it contemplate interfering with specific liens third persons may have, under the laws of the State, upon property included within the schedule.

Our Constitution, on the subject of homesteads, and the Act of 1868, indicate, very clearly, that something more is meant by the homestead provisions than a mere exemption of the debtor's property from levy and sale. The Constitution provides, that the General Assembly shall enact laws for the full and complete protection and security of the same, to the sole use and benefit of the families aforesaid: Constitution, Article VII., section 1. And the Act of 1868, to carry this vision of the Constitution into effect, provides for the appointment, by a next friend of the wife, apart from the husband, of a trustee to manage the homestead. The Act, too, clearly contemplates that, after the laying off of the homestead, it shall become the property of the wife; she is authorized to sue for trespasses upon it, and, at her death, provision is made for its disposition, as though it were not the property of the husband at all: Act of 1868, page 27.

But it is very clear that until it is laid off there is no property, or right of property in the family. The right of

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the wife and family to a homestead does not stand on the footing of an equitable title or lien, which follows the property into the hands of a purchaser with notice. It is a right which depends for its *existence* upon the judgment of the Court. We have held in the case of *Blivins vs. Johnson*, December Term, 1870, that when the application had been made when there was a *lis pendens*—a purchaser at sheriff's sale, under notice, bought subject to the judgment. But we have not held that any purchaser, at any-time, who bought the property with the notice that the wife had no homestead, bought subject to it. It follows, from the very nature of the thing, that the wife can have no title or lien, because not only her right to it, but the number of acres and the location of it, are dependent upon the judgment of the Court. Indeed, her right depends largely upon her application. Thousands of wives and families do not apply for it. Indeed, the main and only object of the law is to interfere for the protection of the family against creditors who, if they were permitted full sway, would render the family homeless and often throw them upon the public for support. It is clear to us, therefore, that this right of the wife is no title, lien or incumbrance upon the husband's property, until it has been appropriated by a judgment. If this be so, the jurisdiction over it passes, in case of the bankruptcy of the husband, to the Federal Court.

We have in the case of *Hardeman & White*, 38th Georgia, analogized this right of the wife to the case of a preferred or prior debt, and we have spoken of the proceedings as a mode provided by law for its recovery. Perhaps that is the correct view of it.

In my judgment, the true course for these wives is to present the claims before the Bankrupt Court, not as an exemption of the husband's property, but as a claim of their own against it, having, by the laws of Georgia, a preference over other claims against him.

We have in this case allowed the decision made at this

Tommev & Stewart vs. Ellis.

term, in the case of *Lumpkin vs. Eason*, to be expressly questioned, and the questions argued without reference to that decision. We abide by the decision in that case. For myself, whilst I may not put the case upon the same ground as my brethren, I abide by the written brief statement then made of the ground of my concurrence.

Judgment affirmed.

TOMMEY & STEWART, plaintiffs in error, vs. JOSHUA ELLIS,
defendant in error.

The question before the jury in this case was whether a certain debt had been transferred by the creditor to A, so as to defeat an offset against the creditor held by the debtor. It was in proof that the transfer, if made at all, was in payment of, or as collateral for, certain debts held by A against the creditor making the transfer, and that A had not given up the evidences of the debt, but retained them in his possession. The Judge charged the jury, in substance, that if they believed that there had been in fact a *bona fide* transfer made, then the transferee was protected against the offset, whether the transfer was in absolute payment or as collateral. There was no request by either side that the Judge should charge as to the effect of A's retaining possession of the notes he held against the person whom it was claimed had made the transfer. The jury found against the transfer and in favor of the offset. On a motion for a new trial, on the ground that the jury found contrary to the evidence, and on several other grounds, the Court overruled the motion on all the grounds taken, but granted a new trial on the ground that he had erred in not charging the jury that the retaining possession of the notes, by A, was not conclusive against the transfer if, from the evidence, the jury should believe a transfer was *bona fide* made :

Held, That this was error as, in substance, such charge had really been given, at least so far as it was proper for the Court to direct the jury as to the weight of the evidence.

New Trial. Collaterals, etc. Before Judge GREEN.
Newton Superior Court. March Term, 1871.

See this case *ante*, 41st Georgia Reports, 260.

Tommev & Stewart vs. Ellis.

Ellis held a judgment against Hammett, Orr & Company, of which firm Tommev & Stewart were members, and from which they had agreed to relieve Orr. Hammett was insolvent. Tommev & Stewart bought certain dormant judgments against Ellis, revived them, and upon averring the above facts and that Ellis was insolvent, prayed to set-off their purchased judgments against Ellis' said judgment. Ellis testified that, before they purchased said judgments against him and before they were revived, he had transferred to W. W. Clark his *fi. fa.* and judgment, *bona fide*, to the extent of all fees due by him to Clark, as his attorney-at-law for services rendered and to be rendered. Ellis testified that before complainant's purchase of the judgments against him, he owed Clark certain fees settled by note, and specified in what cases and how much. He said Clark had not given up his notes, because Clark had not gotten his money. His insolvency was admitted. There was evidence going to show that Clark's fees were too large, but it is useless here. The Court, after rehearsing the pleadings, so as to put the issue fairly to the jury, charged them to inquire if Ellis, at any time, by contract or otherwise, had transferred to W. W. Clark, in good faith, his claim against Hammett, Orr & Company, and if so, to see whether the transfer was conditional or absolute, and upon what consideration. If the transfer was *bona fide*, absolute, and for a valuable consideration at the time he handed Clarke the claim for collection, they should find for defendant. But if it was transferred only conditionally, or rather to pay fees of Clark in certain cases, the jury should inquire what cases, and what Clark's fees were in those cases, and if their amount was equal to the amount due on Ellis' judgment against Hammett, Orr & Company, they should find for defendant. If Clark's fees should be less, plaintiffs should have judgment for set-off as to the balance only. At all events, Clark is entitled to his fee for suing out that judgment, etc: There were no requests

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to charge. The jury allowed Clark \$75 00 for the fee for suing out that judgment, but nothing for the other cases.

Ellis moved for a new trial upon the grounds that the Court erred in his charge, and in admitting certain evidence, and because the verdict was contrary to law, etc. The Court overruled all of said grounds, but granted a new trial upon a ground not taken, to-wit: because he omitted to charge the jury, that leaving the notes on Ellis in Clark's hands was not sufficient to invalidate the transfer of Ellis' judgment, provided; the transfer was *bona fide*, in payment for professional services rendered and to be rendered, whether said transfer was absolute or conditional, and that the revival of dormant judgments, since the transfer to Clark, could not affect the transfer to Clark. This is assigned as error.

J. J. FLOYD, for plaintiffs in error.

CLARK & PACE, for defendant.

MCCAY, Judge.

There is plenty of evidence in this record to sustain the verdict; indeed, we think the weight of the testimony is that way. The new trial was granted by the Judge solely on the ground that he thought he had improperly neglected to charge the jury that the retaining of the notes was not conclusive.

We think he did, in effect, charge this, since he told the jury that if they, in fact, believed there had been a *bona fide* transfer of the debt, the transferee was protected.

That the retaining possession of the notes was some evidence that there was no transfer, can hardly be doubted. And the whole charge of the Court is pregnant with the idea that if the jury believed, from the evidence, there *had* absolutely or as collateral, the transacted. It is hardly possible the jury the idea that the retention of the notes a transfer. Every man of common he transfer was made, and was col-

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lateral only, it was very proper to retain the notes, and it would be presuming very far on the ignorance of a jury to suppose that it was a *sine qua non*. It should be instructed against so gross a perversion of both law and common sense as this. The verdict is in accordance with the evidence, even though the jury only gave the proper weight to the fact of the retention of the notes. If the defendant's evidence went to show a positive transfer, and not a mere collateral deposit of the debt sued as security, then the retention of the notes by the transferee was very suspicious, and went largely to weaken the effect of the testimony. On the whole, we think it most in accord with the principles of law and justice that the verdict shall stand.

Judgment reversed.

N. F. WALKER *et al.*, plaintiffs in error, vs. JAMES R. WALKER *et al.*, defendants in error.

1. Where there was a bill and answer and plea, and it was agreed that as there was no dispute as to the facts, the Judge should decide the case on the pleadings:

Held, that the facts set forth in the bill, answer and pleas are all to be taken by the Judge as true.

2. Where, by consent of parties, a verdict was taken in an equity cause, for the complainant, the amount of the verdict to be left blank, and afterward, at the same term, a consent agreement was entered into by the parties, and put upon the minutes of the Court, reciting the fact of the verdict, and agreeing that the blank should be filled by the Judge by proper order, after a hearing in vacation, and a decree was then taken by the complainants, leaving the amounts also in blank, and the hearing was had as agreed upon, and an order passed by the Judge directing the Clerk to fill the blanks in the verdict and decree, which was accordingly done:

Held, That under this state of facts, and after nearly three years have elapsed without any motion by the defendant, it was not error in the Court below to refuse to sustain a bill of review to allow a new hearing on the sole ground of error of law, on the face of the proceedings. Whatever of defect there is in the record is cured by the consent of the parties.

Equity. Bill of review Before Judge GREEN. Upson Superior Court. May Term, 1871.

The bill of review, which was filed in office on the 3d September, 1870, alleges that James R. Walker, William H. Walker and James H. Gray, all of Taylor county, on the 5th day of December, 1865, instituted their suit in equity, in the Superior Court of Upson county, against Nathaniel F. Walker, wherein they prayed a decree for the specific performance of the following contract: "For value received, I hereby promise and agree to pay and deliver to James R. Walker, James H. Gray and William Walker, by the 25th day of December next, two hundred and fifty bales of cotton, on the following terms, to-wit:

"1. The whole lot to average good middlings.

"2. Such as may be already baled to be considered as delivered by the 10th November next, say one hundred and fifty bales, the remainder to be considered delivered by the 25th December next.

"3. The said N. F. Walker is to be allowed twenty-six cents per pound for all cotton delivered under this contract.

"4. All that may be lacking after the delivery of said cotton, to make up the sum of forty-six thousand and twenty-six dollars and twenty-nine cents, is to be paid by the said N. F. Walker, by the 25th December, 1866, in cash or cotton, at the then market price. N. F. WALKER.

"September 27th, 1865.

"Attest: JAMES M. SMITH."

They likewise prayed the writs of injunction and *quia* *cler* *dered* to issue, each in a penalty of issued and served on the defendant, to relieve himself from arrest, executed by D. K. Walker, N. M. Walker, Wil-B. F. Walker, conditioned not to re-

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move beyond the jurisdiction of the Court any of the property specified in the bill, or in any manner to dispose of the same. Under an order of the Court passed at the May Term, 1866, this condition was held not to be a compliance with the bond ordered by the sanction, and the defendant, N. F. Walker, was required to give a new bond with the condition that he should well and truly perform his contract contained and set forth in the bill, by the delivery of the cotton therein mentioned, and that he should answer any decree that might be had in the premises, which latter bond, conditioned as last aforesaid, was executed by said N. F. Walker and the securities to the first bond. Thereafter N. F. Walker filed his answer to the bill, and an order was passed modifying the injunction. The complainants amended their bill on the 11th day of May, 1867. At an Adjourned Term, held in January, 1867, an order was taken allowing an injunction issued in a suit at the instance of John L. Woodward, guardian, etc., against complainants in the bill against N. F. Walker, to be so far modified as to allow said complainants to proceed to trial in their bill against said Nathaniel F., without prejudice to the rights of the parties to the bill in favor of said Woodward. At the November Term, 1867, of said Court, the cause of James R. Walker and others against Nathaniel F. Walker was submitted to a special jury, who returned a verdict of which the following is a copy:

“We, the jury, find and decree in favor of James R. Walker and against the defendant.” “We find and decree in favor of William H. Walker the sum of We further find that the matter of difference between James H. Gray and defendant was not submitted to us, and that branch of the case be left open for further adjustment, subject to the provisions of this decree. We further find that there is pending in this Court a bill at the suit of John L. Woodward, deceased, on his own behalf and as guardian of complainants and Allen M. Walker, in which there are sundry matters and equities claimed by the parties unadjusted.

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This decree is not to be paid or settled to the prejudice of the rights of the parties under said bill. We further find that there are sundry summonses of garnishment at the suit of various parties against the defendant as having funds in his hands of James R. Walker. This is not to be paid or enforced so as to prejudice the rights of said creditors of James R. Walker or to the said Nathaniel F. Walker. We further find and decree that there is pending in this Court a bill in equity at the suit of William E. Coleman, trustee of Francis C. Coleman and others if made parties. This decree is not to be enforced to the prejudice of the rights of Nathaniel F. Walker, who is a defendant to that bill as the legal representative of Allen M. Walker, with cost of suit.

“JORDAN LYONS, Foreman.”

At the same term of the Court, and after the return of said verdict, the following agreement was entered into, to-wit:

JAMES R. WALKER, WM. H. WALKER, JAMES H. GRAY, *vs.*
NATHANIEL F. WALKER.

Bill for the relief. Specific performance, etc., in Upon Superior Court. November Term, 1867.

A decree in the above stated case having been rendered by a special jury at this term of the Court in favor of the complainants, James R. Walker and William H. Walker, against the defendant, Nathaniel F. Walker, leaving the amounts due them respectively *blank* in said decree. It is agreed between the parties, James R. Walker and William H. Walder, complainants, and Nathaniel F. Walker, defendant, that his Honor, Alexander M. Speer, shall hear the parties and audit and settle the amounts due the said James R. Walker and William H. Walker, respectively, and said amounts, when ascertained, shall be inserted in the blanks left in said decree, by the proper order of his Honor, Alex-

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ander M. Speer, and that the agreement and the order of his Honor to be entered on the minutes of the Court.

CABANISS & PEEPLES,
Complainants' Solicitors.

SMITH & ALEXANDER,
Defendant's Solicitors.

A decree was then rendered by the Court against N. F. Walker and his securities upon the bond, conforming in all other respects to the above verdict, even as to the blanks. Afterwards, on the third of March, 1868, the presiding Judge, in Chambers, passed an order, of which the following is a copy :

The auditing of the amount of the decree rendered at November Term, 1867, of Upson Superior Court, in the bill of James R. Walker, William H. Walker, and others, against Nathaniel F. Walker, so far as to ascertain and settle the amounts to be inserted in the decree in favor of James R. Walker and William H. Walker, respectively, having by consent of parties been referred to me; and having heard and considered the same, it appears that there was due from defendant to the complainant in the bill the sum of
(to be discharged by the delivery of cotton at 26 cents per pound.) According to the answer of defendants there were delivered to complainants :

\$46,026 29

99 bales, weighing 450 lbs. each...44,550 lbs.

3 bales, weighing 500 lbs. each... 1,500 lbs.

46,050 lbs. .

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At 26 cents per pound amounting to.....11,973 00

Which deducted from original debt leaves.....\$34,053 29

Of this amount William H. Walker and James

H. Gray are entitled each to one-sixth..... \$5,675 54

Two-sixths.....\$11,351 08

The remaining four-sixths of..... 34,053 29

After deducting..... 11,351 08

\$22,702 21

Received by sale of cotton for J. R. Walker, by

P. W. Alexander, Receiver.....\$ 3,000 00

Principal due J. R. Walker.....\$19,702 21

Interest from December 25th, 1866, to Novem-

ber 7th, 1867, when the decree was rendered. 1,195 23

The amount of principal due James R. Walker,

to be inserted in the decree..... 19,702 21

Interest to November 7th, 1867..... 1,195 23

Principal due W. H. Walker, to be inserted in

the decree 5,675 54

After deducting \$3,700, received from sale of

cotton by P. W. Alexander, Receiver..... 3,700 00

\$1,975 54

Interest to November 7th, 1867..... 119 83

It is therefore ordered that the Clerk of the Superior Court of Upson county fill the blanks in the decree with the amount of \$19,702 21, principal, and \$1,195 23, interest, to the 7th day of November, 1867, in favor of James R. Walker; and principal, and \$119 83, interest, to November 7th, 1867, in favor of William H. Walker, and that this be minutes of the Court.

ALEXANDER M. SPEER,
Judge Superior Court, Flint Circuit.

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Afterwards the blanks in said verdict and decree were filled with the amounts found to be due to said James R. and William H. Walker, respectively, and execution issued therefor against said N. F. Walker and his said securities. The decree and execution, so far as respects the securities, was set aside by order of said Superior Court upon their motion, and said action has been confirmed by the Supreme Court. The bill of review seeks a reversal of said decree upon the grounds following, viz: because when said decretal verdict was rendered said cause was not ripe for trial; that said verdict does not cover any of the issues submitted by the pleadings in the case except the costs; that it does not purport to be final, and is, at best, but an interlocutory verdict, which is unknown to and unauthorized by law; that by the terms of said incomplete verdict no decree could be entered thereon at the term of the Court when the same was found; that the Chancellor had no power in vacation, even with the consent of the parties, to audit and settle the accounts between them, and upon ascertaining the amounts due complainants, to direct them by his order, passed in Chambers, to be inserted in the blanks left in said decretal verdict and decree, for that he is forbidden by law to render such decrees in vacation; that said consent did not authorize and empower the Judge, acting as Chancellor, to fill any blanks by his order, passed in vacation, except those in said decretal verdict; that under said consent he was not authorized to fill blanks in the decree entered on said verdict, the defendant, N. F. Walker, never having consented, as appears from the record, to entering up and rendering such decree, and because said decree is erroneous and void for uncertainty and cannot be enforced until the issues reserved therein, as also in said verdict, have been settled and determined. And for as much as no order and decree appears in said proceedings determining said issues, and no order to issue execution thereon, the said execution issued in said cause is illegal and void, and is proceeding without authority of law. The defendants filed to this bill

what purported to be a plea, answer and demurrer, in which they admit that the Court proceedings set forth by bill are correctly copied, but insist that the decree is lawful in all of its parts and stages; they insist that it was found on account of the great age and infirmity of Nathaniel F. Walker, who attended Court with great inconvenience, as well as to settle the rights of a large number of persons, having or claiming rights arising out of the litigation in the bill, and to protect the rights of complainants; they state that it was agreed between the parties that a blank decree as to amounts should be taken at that term of the Court, and that because it was impracticable to have the amounts properly audited at that time, should be referred to the Judge to audit the same at Chambers, at a time to be fixed, and upon notice to be given by him, and the blanks should be filled by his order with the amounts ascertained to be due; that he audited the accounts and passed the order, and the blanks were accordingly filled. They go into the origin of the contract of which a specific performance is sought, and the motives for making it, and shew that it was founded upon a decree between the same parties for a larger amount, and that it is novation of the old indebtedness, and they demur to the bill of review, because complainants therein have a plain, adequate and complete remedy at law.

The parties being ready, the cause was, by consent, submitted to the Court "upon all questions of law and facts as they appear on the pleadings." "There being no disputed questions of fact arising in the cause," the Chancellor refused the prayer of complainants in the bill of review, and affirmed said decree. This is assigned as error.

POE, HALL & POE; DOYAL & NUNNALLY, for plaintiffs in error. Bill of review does not lie to correct *formal* errors: Story's Eq. Pl., sec. 411. Equity has no jurisdiction to compel specific performance of a contract to pay specifics: R. Code, secs. 2732, 3132. Remedy at law complete: 17th Ga.

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R., 77. When *quia timet* will issue : R. Code, sec. 3165 explained by sec. 2 Act Mar. 23d, 1814, sec. 1 ; Act 22d Dec., 1830, sec. 1 ; Act 23d Dec., 1830 ; Cobb's N. D., 526, 527. No *ne exeat* as remedy at law : R. Code, secs. 3159, (1), 3160. Decree not final because the verdict finds none of the issues between the parties : 17th John's R., 559 ; 2 Dan'l Ch. Pr., 1199, 1192, 1193 ; R. Code, secs. 4153, 4142, 4147. Decree is void because amounts are blank : 40th Ga. R., 56, and covers no issue made : R. Code, secs. 34, 79 ; nor does the consent for Judge to fill them help it, for verdicts cannot be prospective : 14th Ga. R., 167. *Consensus tollit errorem* applies only when the consent covers the matter : 3 P. Wms., 242 ; 3 Dan'l Ch. Pr., 1603. Review lies when Court exceeded its jurisdiction : 3 Dan'l Ch. Pr., 1727-8 ; 1 Vern. R., 292 ; 9 Sm. & M., 144 ; so for error in law, against statute : Cooper's Eq. Pl., 89 ; Dan'l, *supra*, note 3. Formerly, a decree to sell trust property, made in vacation, was void : 10th Ga. R., 429 ; changed by Act 20th Feb., 1854 : R. Code, secs. 4160, 4165, 239. The agreement was not in order for decision in chambers : R. Code, sec. 3541. As to power to decree without jury : R. Code, secs. 4142, 4144, 4147.

CABANISS & PEEPLES ; SMITH & ALEXANDER ; SPEER & BECK, for defendants. Judge may act in vacation under order in term : R. Code, sec. 239 ; 1 Ga. R., 300. A decree is judgment of Chancellor on the facts : R. Code, sec. 4153. A decree may be moulded to suit circumstances : R. Code, sec. 4154. Court was auditor, and his report, unexcepted to, good basis for decree : R. Code, sec. 4147. At best, this confession of judgment was right : 7th Ga. R., 110 ; R. Code, secs. 3541-3. Auditor can act in term or vacation : R. Code, sec. 3082. Motion to set aside judgment was complainant's remedy : R. Code, sec. 3559. The report was amendable : R. Code, sec. 3532. No fraud, accident or the like in decree : R. Code, sec. 3537. Formal error insuffi-

cient for review : 12 Ga. R., 18 ; Mitford's Pl., 67 ; Story's Eq. Pl., 411.

McCAY, Judge.

This was a bill in equity for a review of a former decree. The bill had been regularly filed. An answer had not been waived, and the defendant had, within the proper time, under rules regulating the practice, answered the bill. Under the law, the case was ready for a hearing before the jury with the answer, as evidence for both parties. In this state of it the parties agreed that, as there was no dispute about the facts, the Judge should decide the case on the *pleadings*. What were the pleadings? Clearly, the bill and answer. We think, therefore, it was proper for the Judge to consider in his finding the facts stated in the answer. The presumption is that the answer replied to the charges in the bill either by admission or denial, and the case went before the Judge with an admission that everything set up in the answer responsive to the bill was true. Perhaps the agreement fairly may go even further. As it agrees that there is no dispute as to the facts, it may fairly be construed into an agreement that facts set up by the defendant in his answer by way of defense are true, even though not responsive to, but in avoidance of the charges in the bill, since it can hardly be said there is no dispute about the facts if the facts of the case claimed by either party to be true are to be construed or not taken for true.

We think the course pursued in this case was a very loose one ; and one that ought not to be encouraged. But it was by consent of the parties ; and, under section 10 of the Code, parties may waive or agree to almost anything not involving the public interest or public policy. There is no complaint of any violation of the rights of any of the parties. It is not even contended that the amounts formally inserted in the verdict and decree are unjust. This bill is based upon the

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naked claim that the proceeding is not lawful. We are clear that it was in accordance with the agreement of the parties. And, as they have acquiesced in it for three years, we think they are bound by it, especially as they do not show that any injustice has been done them. And if they had, we are not sure that they do not stand as any other party who has a judgment against him. To open it, he must show fraud or some mistake or accident, materially affecting the result, without any admixture of negligence on his part. Public policy requires that there shall be an end of litigation, and a judgment ought to be final.

Judgment affirmed.

GEORGIA A. WORTHY, plaintiff in error, *v.* H. G. TATE,
defendant in error.

When a bill in equity was filed by Mrs. Worthy, alleging that she had purchased from Tate the premises in dispute, and having great confidence in him, had given him the deed and tax receipts thereto, at his request, which on her request to return, he said he had burned up, and the prayer of the bill was to cause said deed and tax receipts to be returned, and also to enjoin proceedings to eject her as the tenant of Tate, the former owner, under the provisions of the Code against tenants holding over. And she further presented her inability to give bond under the section of the Code requiring security with the counter-affidavit to arrest the proceedings under the warrant, etc., and the bill was demurred to and a motion made to dismiss it upon the ground that there was a complete remedy at law, and for want of equity, which motion to dismiss was sustained by the Court:

Held, Under the facts presented by the bill that this was error. There was equity in the bill as against Tate, to cause the delivery of the deed and tax receipts, and the provision for defense by counter-affidavit and bond under the 4007 section of the Code was not ample and complete, and the facts developed such a condition of alleged fraud and trust, as invoked the jurisdiction of equity.

Equity. Landlord and Tenant. Before Judge BIGBY.
Troup Superior Court. November Term, 1869.

This cause is reported in the opinion.

B. H. BIGHAM, by T. H. WHITAKER, for plaintiff in error.

LONGLEY & HARRIS; N. J. HAMMOND & BROTHER, for defendant. The sole reply by tenant holding over is by counter-affidavit and bond: section 4005 *et seq.*, Revised Code. Tenant may not dispute the title of him under whom he took possession till possession is surrendered: 12 Georgia Report, 386; 29th, 506; 37th, 650; 39th, 381; Revised Code, section 2257.

LOCHRANE, Chief Justice.

This was a bill in equity filed by Mrs. Worthy, in which she alleges that in the year 1863, her husband, being then in life, bought from Horatio G. Tate certain land. The bill avers that her husband acted as trustee for her and her children, and that she paid for the property out of her own separate money. She further alleges that the defendant executed a deed to her for the premises in dispute for the sole and separate use of herself and children, in the presence of witnesses, whose names she sets out in her bill. Further she alleges that in 1865 Horatio G. Tate came to her house and asked to look over the papers and deed, and she delivered them to him, and that he carried off the deed and her tax receipts for the property, etc. She also avers her great confidence and trust in Horatio G., and that, afterwards, when she asked for the deed, he told her he had burned it up. She also alleges that she and her children had been in possession since the purchase. Subsequently Tate took out a warrant
erty, to which she made a counter-
urned to the Superior Court, and
upon the ground of the insuffi-
she sets out these facts, further al-
to give bond on account of her

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poverty, which was held to be unauthorized under the provisions of the Code, and her defense dismissed. This bill avers her inability to give bond on account of her poverty, etc. She prays an injunction restraining proceedings for her eviction. She also asked for a perpetual injunction, and that Tate be compelled to deliver to her her title deeds and tax receipts, etc.

Upon the hearing, defendant's counsel moved to dismiss this bill upon the ground that there was a complete remedy at law, and that she could have set up all her alleged defenses at law, and because the proceedings were instituted against a tenant holding over, etc. The Court sustained this motion and dismissed the bill, to which ruling and judgment, by the Court, she excepted, and the case is now before this Court upon exception to that judgment.

An important question lying at the foundation of this case arises under section 4007 of the Code. When the landlord, under section 4005 of the Code, makes the required affidavit, the warrant or process issues to remove the tenant from the property; and to stay this summary proceeding, under the 4007th section, the tenant may prevent the removal by declaring, on oath, certain prescribed defenses, provided such tenant shall, at the same time, tender a bond with good security, payable to the landlord for the payment of such sum, with costs, as may be recovered against him on the trial of the case." Waiving for the present the other averments of the bill, when the tenant, from poverty, is unable to give this bond, is there no other resource of defense left to prevent his removal? We can readily understand the intention of the Legislature in prescribing the bond as an essential to the arrest of the proceedings. Parties insolvent may obtain possession of premises, and, under any pretext, hold them, by making a counter-affidavit without bond, if they are unable, from their poverty, to give it. But this the law prevents. A tenant must comply with the law, and tender his bond, with his counter-affidavit, within reasonable time. The affidavit

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is incomplete without the bond, and has no effect in arresting the process in the hands of the officer. But while this is true, if there be any ground of equity interposition in the premises, and the party, by proper averments, sets up grounds which would render it unjust and inequitable to remove them by such warrant, we do not see why equity, upon a proper case made, should not enjoin the proceedings. It would be a harsh construction of the law which would make the poverty of the party a reason for denying them justice. Ordinarily, no Court would sanction an injunction to restrain these authorized proceedings by statute. But if the tenant could show a defense, not within the statute or outside of it, or grounds within it, which by the bill showed that injustice would be done, we think it is within the sound discretion of the Chancellor to interfere with the process of the law by injunction and grant a hearing to the parties.

In the case at bar Mrs. Worthy sets up that she is the owner of the premises in dispute, and by the fraud of the defendant she has been deprived of her muniments of title. Even if she could have given the bond under the Code, she would not have had an adequate and complete remedy at law. Her deed had been taken by the defendant. Confiding, as the bill sets out, in him, she had given it to him, and she was entitled to go into equity for the purpose of compelling it to be delivered back to her. We do not think that the original proceedings commenced at law by the defendant, and the fact that she could have set up her defense in that forum, ousted her of her right, under the facts of this case, to go into equity to restrain the proceedings commenced at law against her.

But it is contended, under the facts in this case, that the

Worthy went into possession as
ot, therefore, set up her claim of
l. It appears, from the record,
bill was presented to the Judge
to take the usual verification,

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and she appended to the bill interrogatories, taken in the previous proceedings, to exhibit to the Judge the truth of the allegations as sworn to in such interrogatories. These interrogatories still constitute a part of the record, and by them it appears that she went into possession by rent in December, 1861, under contract for rent for 1862. Taking these interrogatories as a part of the record for one purpose, we may properly regard them for other purposes, and they show the expiration of this term of rent and the purchase and possession under the claim of purchase and deed for some five years before the assertion of the landlord's right in the premises. Does this case, upon the facts, present such a relationship of landlord and tenant as denies to the tenant the right to deny the landlord's title while in possession?

It is proper to look at the facts stated upon which the relation is said to exist, and we hold that while the relation of landlord and tenant did exist in 1861 and 1862, the question is, did it continue to exist? And was it existing at the time of the institution of these proceedings? For while we recognise in its fullest extent the law to be that a tenant cannot deny his landlord's title while in possession under him, yet, if A rents land from B for one year, and at the end of the year sells to B, and makes him a deed to the land, the doctrine does not apply, for the relationship does not exist; the contract of the parties has ended it.

Under all the facts in this case, we hold that the Court erred in dismissing the bill, and reverse the judgment.

WILLIAM REID, plaintiff in error, *vs.* JESSE MCLENDON,
defendant in error.

This was an action on the case for damages alleged to have been suffered by the plaintiff in consequence of the seizure of his cotton in 1865 by the United States Treasury officials, which seizure, it was alleged, was

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caused by an affidavit made by the defendant to the effect that plaintiff had subscribed that amount of cotton to the Confederate cotton loan, and had not paid the same, which affidavit, it was alleged, was untrue. It was in proof that the defendant had made the affidavit, and that the plaintiff had subscribed to the said loan, and had in fact fully paid it. It was further proven that the Treasury agents had seized the cotton, and that the proceeds had gone into the United States Treasury. There was also proof that the defendant, who was himself one of the sub-agents for collecting the cotton loan for the Confederacy, had some reason to believe, and did in fact believe, that the plaintiff had not paid his loan to the Confederacy. The Court was asked to charge that, if the plaintiff's cotton was seized by the Treasury agents in consequence of defendant's affidavit, and that said affidavit was untrue, he then was liable for plaintiff's damage; and that the measure of the damages was the value of the cotton, with additional damages as a punishment, if the proof showed malice on the part of the defendant. This charge the Court refused, and charged that, if the defendant acted in good faith, and made the affidavit on proper demand by the United States officials, honestly believing he was stating the truth, after proper caution and prudence on his part as to his means of information, he was not liable at all, even though he was mistaken in the statement that the loan had not been paid:

Held, That there was no material error in the charge, and the jury having found under the charge for the defendant, it was not error in the Court to refuse a new trial.

Action for special damages by words. Before Judge BIGBY. Troup Superior Court. May Term, 1871.

The necessary facts are in the head-note and opinion.

MABRY, TOOLE & SON; LONGLEY & HARRIS; WILLIAM DOUGHERTY, for plaintiff in error.

B. H. BIGHAM, (by THOMAS WHITAKER); FERRILL; HAMMOND & BROTHER, for defendant.

McCAY, Judge.

The sole point in this case is, whether the charge of the Court was right under the evidence. If the law was rightly declared to the jury there is evidence to sustain the verdict on either side according to the weight the jury may have

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given to the facts as proven. If a man, under an honest mistake of facts, makes a statement which leads the government, or even an individual, to seize the property of a citizen, is the person making the statement responsible to the party injured for the value of the property seized? As a matter of course, *he is liable* if he be in complicity with the seizure, if he take any part in it, if he aid or abet it; in other words, if he be a joint trespasser. And this the Court told the jury; but the Court further charged that, if the defendant below, on proper demand by the United States officers, in good faith made the affidavit, thinking it was true, after proper caution and prudence on his part as to his means of information, he was not liable at all, even though he was mistaken in the statement he actually did make. We do not think this charge error under the facts. There was a good deal of evidence going to show that the defendant had acted in good faith; that he honestly believed William Reid had made the subscription, and that he had not paid it. That he made the subscription is not denied, and that he did not pay it promptly is not denied. The lists of unpaid subscription was sent to McLendon as late as 1863. It was *then* unpaid, and remained unpaid some time; as McLendon testifies that he wrote to Reid more than once about it. That McLendon should, from these facts, conclude it was not paid is very natural. And his conduct after Reid told him it *was* paid goes to show that he was acting in good faith and under an honest conviction of the truth of his statements. There was evidence to justify the charge and sustain the verdict if the charge be law. And this brings us to the consideration of the main question: How far is one responsible who, in *good faith*, makes a statement which leads another to *commit a trespass* or to commence proceedings resulting in loss or damage to third persons?

We are inclined to think this act of the Treasury agents was a *trespass* only defensible as other trespasses, by showing that they had a right to seize. In this issue, under the proof,

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the Treasury agents were, as we understand the law, trespassers, since it is plain this was not, in any sense, Confederate cotton. The first inquiry, therefore, is, how far is one who, in good faith, makes a statement which is in fact untrue, but which leads another to *commit a trespass* by which loss or damage comes to a third party, liable. If the statement be made in *bad faith*, and with *intent* to incite the trespass, the teller of the untruth would perhaps be fairly classed as an abettor of the trespass, and be liable, since *all* in such a case are equally liable as principals. But this was not the case as put by the Judge. McLendon is supposed by the Judge to have acted, in the opinion of the jury, in good faith—thinking the statement true, and to have made it, not to incite the trespass, but in good faith, on proper demand made by the United States officials. We do not think one who honestly makes a statement he believes to be true is responsible for a *trespass* committed by one who is influenced to act by the statement, and we think it will be difficult to find any authority to sustain a doctrine different from this. See 12 Barbour, 657. In *Vickers vs. Wilcox*, 8 East., 1, Lord Ellenborough lays down, as a general principal, that in an action of slander special damage cannot be relied on, if that damage come from the illegal act of a third person, even though he be injured by the slander.

If there be no proof (as there was none in this case) that the defendant took part in the trespass; if the facts fail to show that he incited—willfully induced—the seizure; if, in other words, the trespass was only the *illegal* act of third persons, influenced by the statement of the defendant, we think the case in 8th East's Reports controls it. This, it is true, is not an action of slander of title, but it very closely analogizes itself to such an action. Indeed, as is well said by Mr. Townsend, section 130 in his work on slander: "The action for special damage to plaintiff's property, caused by the untrue words of the defendant, is not strictly an action of slander, but rather an action on the case for damages."

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The case of *Hamilton vs. Hunt*, 14th Illinois, 472, draws the true distinction. There two persons had joined in the sale of a steer. One of them, by mistake, pointed out as the steer sold, a steer belonging to the plaintiff, and the purchaser, acting on this, took him and killed him. The Court held that, as the person pointing out the steer was one of the sellers, the pointing him out was but the consummation of the sale, and that he was, therefore, liable; but the Court, in that case, says: had the person pointing out the steer been a stranger, he would not, if he acted in good faith, be liable. And in this case, if McLendon was interested in the seizure, or if he, in bad faith, made this affidavit, with *intent to incite it*, he would be liable, for the plain reason that he would be a part actor in the trespass.

It is the well settled rule, that in all actions for special damage to personal property, caused by untrue statements, the proof must show malice on the part of the defendant: *Hilliard on Torts*, and the cases cited, 1st volume, 335. See also, 6th B. Monroe, 301; 3d Denio, 110. Thus far upon the assumption that the act of the treasury agents, in seizing this cotton, was a trespass. If it was a lawful act, that is, if they were clothed with legal authority, in this way to assert the claims of the United States, to cotton, said to be subject to confiscation, the case is stronger still for the defendant. We do not say that this was a regular, legal proceeding. It is somewhat doubtful, it is true, whether this State was then not under the dominion of the military possession assumed at the close of the war, though we incline to think to the contrary. But if this were so, then we think defendant is not liable, unless he acted in bad faith. His act was in aid of the Government. Public policy favors informers. It is, in fact, every man's duty to furnish to the Government, any information he may have touching its rights. And the law throws a shield over every man, who, in good faith, furnishes information, even though it be untrue in fact. Not even malice, alone, will render him liable. There must, in addi-

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tion, be want of probable cause: 6th Blackford, 204, and Hilliard on Torts, 1st volume, 345. The charge in this case, required that the jury should be satisfied that this statement was not only made in good faith, but after due prudence, and this is the same thing as saying, there was probable cause.

Upon the whole, we think the charge upon this point right, and as the case turns upon it, and the evidence supports the verdict, we affirm the judgment.

JAMES M. AUSTIN, plaintiff in error, vs. WILLIAM MARKHAM, defendant in error.

1. A motion to reinstate a case, made at a term subsequent to that at which the judgment of dismissal was had, stands on the footing of a motion for a new trial, and requires the same excuses for a delay as is required in motions for new trial after the term has passed.
2. If a discharge in bankruptcy be pleaded, the Court cannot dismiss the cause on that ground, but must submit the issue to a jury. (R.)
3. A promise to pay a debt due by an applicant to be declared a bankrupt, in consideration that the payee will withdraw his objections in the Bankrupt Court to the discharge of the bankrupt, is illegal and void, and no action can be sustained on such promise.

New Trial. Bankruptcy. Contracts. Before Judge WRIGHT. Fayette Superior Court. April Term, 1871.

Markham sued Austin for \$..... and interest, averring as follows: He obtained a judgment against Austin. Afterwards Austin filed his petition in bankruptcy, and was declared a bankrupt under the Bankrupt Act of 1867. Markham proved this judgment as a debt against Austin's estate, and when Austin applied for his discharge in bankruptcy, opposed it. In consideration of the premises and of Austin's promise to pay him the sum now sued for, if Markham would withdraw his opposition to said discharge, Markham

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did withdraw it, and Austin was discharged ; and yet Austin refuses to pay said sum. Austin pleaded his said discharge in bar of this suit. Markham replied, a promise since said discharge. Judge Bigby dismissed the cause because of said discharge. At the next term, Markham's counsel averred that said cause was called on the last day of the Court, after the juries were discharged, and after he had left the Court, and moved to reinstate it. Judge Wright reinstated it, and that is assigned as error.

R. T. DORSEY; HUGH BUCHANON, for plaintiff in error.

TIDWELL, FEARS & ARNOLD, for defendant.

McCAY, Judge.

1. We are inclined to think this motion to reinstate came too late. If the Court erred in dismissing the suit, was it not a simple error of law? And, if so, why is not the movant barred by his failure to except to the decision, as required by the Code, within thirty days after the adjournment of the Court? A Court may, at the next term, hear such a motion when the judgment was based upon some mistake of fact or fraud, etc., but even then there ought to be some reason why the motion to reinstate was not made at the term. But if the error be simply an error of law, it would seem that there ought to be the same excuse for delay as is required to excuse delay in a motion for new trial.

2. Were this an action on the promissory note, which is the debt promised to be paid, we should not be so clear that the production of the certificate of discharge would authorize the Court to dismiss the suit. Why is *this* plea in bar different from any other plea? Is there anything in such plea which divests the jury of jurisdiction? Why is not the *fact* of discharge a matter to go to the jury, just like any other fact? True, it is conclusive when made out, but so is payment or *non est factum*.

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3. But this is an action on the promise of the defendant to pay this note, in consideration that the plaintiff would withdraw his opposition to the defendant's discharge as a bankrupt. This is set forth in the declaration. Such a promise is illegal and void, by the positive provisions of the bankrupt law of 1867. And even without this it would be void; such a promise is a fraud upon the other creditors, and is contrary to public policy. The plaintiff's suit was, therefore, properly dismissed, and it was error in the Court to reinstate it.

Judgment reversed.

M. M. SMITH *et al.*, plaintiffs in error, vs. W. A. MAGOURICH *et al.*, defendants in error.

Under an Act of the Legislature a new county was organized, and the voters required by ballot, under the usual superintendents of such elections, to locate the county site, and in casting their ballots various places were designated, which the commissioners, appointed by the Legislature, together with the Ordinary elect, from their contiguity to each other and a common understanding among the people as to what was meant, held to be one and the same thing, and consolidated the various votes, which, by addition together, gave a majority over the centre of the county, which was also voted for; and such commissioners proceeded, under the Act, to lay out town lots and offer them for sale; and other citizens dissatisfied with their judgment, brought a bill of injunction to enjoin such commissioners, and the Court below granted the injunction upon the hearing of the various affidavits, *pro* and *con*, touching the premises. Several witnesses testified that these various places were not the same and a much larger number testified that they were:

Held, Under the facts in this case, that a Court of equity had jurisdiction at the instance of citizens of the county to enjoin the commissioners from doing what they alleged to be an illegal act, which resulted to their injury as tax-payers and property holders of the county.

Held, again, Under the facts in this case, that the question of location upon the part of the commissioners, being a question of disputed fact, we cannot say that the Judge violated the discretion vested in him by law in granting the injunction; and we, therefore, affirm the judgment,

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with the following modification and direction, to-wit: that the place selected by the commissioners and located by them, shall remain as now located, as the place for the transaction of county business by the officers of said county, who may make such arrangements in connection with the commissioners, for the holding of Courts at that place as may to them seem proper until the final hearing of this case.

Injunction. Before Judge WRIGHT. Douglass Superior Court. October Term, 1871.

The necessary facts are in the head-note as delivered from the Bench.

PEEPLER & HOWELL, for plaintiffs in error.

HUGH BUCHANAN; GEORGE N. LESTER, for defendant.

LOCHBANE, Chief Justice.

The Legislature of Georgia, by an Act approved October 17, 1870, provided for the organization of a new county, and by the second section thereof it was enacted "that all persons included within the limits of said county who are entitled by law to vote, shall, at the several precincts of said county, elect their county officers, etc., and also, at the same time and places, by ballot, locate their county site at some suitable and convenient place in said new county, under the same rules and regulations as other elections. The third section enacts that the Ordinary of said new county elect, with four commissioners therein named, shall, after the county site is located as hereinbefore provided, purchase a tract of land at said county site, lay off the same into town lots and sell them at public sale, and apply the proceeds of the same to the building of a Court-house and jail for said county." It appears from the record an election was held in this new county, and the commissioners, after such election, in the opinion entertained by them, located the county site at a point not receiving a majority of the ballots cast at such election. They were proceeding to sell the lots and erect the

public buildings when the complainants below filed their bill in which they alleged that the commissioners are acting in violation of law in their location of the county site, with the usual averments of injury, and exhibits of the votes cast, by which it appears, as well as by affidavits produced at the hearing, that three hundred and odd voters had cast their ballots for the location of the county site at the centre of the county, and a larger number had voted for other places by different names, but contiguous to each other, and which the commissioners held to cover one and the same location. We need not go through this mass of affidavits in disposing of this question, arising upon the ground of error to the judgment of the Court below, in granting an injunction restraining the commissioners from proceeding from such location of the county site, sale of lots, and erection of public buildings, etc. It is apparent from the record that the site selected by the commissioners was not plainly a point designated by a vote of the largest number of the citizens of said county, and it is only by inference and explanations that they set up their right in the premises. It is true that a number of these affidavits show, in the opinion of the witnesses, these various places, designated by various names, were understood to mean one and the same place. And we have no doubt of the competency of the parties to prove *aliunde* of the votes cast that such places as they voted for were generally known to be the same or contiguous places; and we have no doubt of the entire good faith of the commissioners. But the legal question presented by this record is the error of the Court below in granting an injunction upon a disputed statement of facts; and while we may not concur, perhaps, entirely with his judicial opinion in the premises, we do not think that there was any abuse of the discretion of the Judge below, and affirm his judgment with modifications and directions in the premises.

(See last of head-note. R.)

Trammell vs. Marks.

A. O. & A. A. TRAMMELL, plaintiffs in error, vs. R. H. & J. E. MARKS, defendants in error.

A bill was filed, alleging that in 1868 the complainants had purchased of defendants a tract of land, described in the deed as containing three hundred and fifty acres, more or less, for \$5,000 00, half of which was paid in cash, and the balance secured by note and mortgage, of which there was still due \$1,250,00, and that proceedings were pending for the foreclosure of the mortgage; that the defendants had falsely and fraudulently represented said tract to contain three hundred and fifty acres, and complainants had bought the same on the faith of their said representations; that complainants had, by a recent survey, ascertained that the said tract did not contain more than two hundred and sixty-four acres. The bill further alleged that the defendants were insolvent, and prayed an injunction of the proceedings to foreclose—a cancellation of the deed to them—and the mortgage—a decree for the money they had paid, and that the land be declared subject to the decree.

Held, That, as there was no allegation in the bill to show that the prime quantity of three hundred and fifty acres of land was such an ingredient in the trade as could not be compensated by recouping the value of the deficiency against the amount still due, there was no ground for the rescinding the trade. And as the remedy at law by plea was complete for the deficiency, equity has no jurisdiction of the matter.

Rescinding contracts. Before Judge WRIGHT. Meriwether Superior Court. August, 1871.

The necessary facts are in the head-note.

W. D. TRAMMELL; B. H. BIGHAM, by T. H. WHITAKER, for plaintiffs in error.

E. H. WORRILL; GEORGE L. PEAVY, for defendants.

McCAY, Judge.

There was no error in refusing this injunction. There is nothing in the bill to the effect that the precise quantity of land mentioned in the deed was such an ingredient in the original purchase as that the whole transaction ought, for the failure, to be set aside. A Court of equity will not interfere to stay proceedings at law, and set aside a contract for the

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simple reason that one of the parties has told an untruth or broken his warranty. Ordinarily, parties will be left to their legal remedies. To justify the interference of equity to set aside the contract, it must appear that the facts are such as that damages cannot compensate the wrong; that there was some special object in the contract, which cannot, under the facts as they really are, be attained; and, the object of the contract having failed, it would not be equitable to hold the complainant to that part of it which is in accordance with the agreement.

It does not appear but that the deficiency in land may not be fully compensated by a reduction upon the money yet due. This can be done just as well at law as in equity; and a Court of law having got jurisdiction, we see no reason for equitable interference.

Judgment affirmed.

SPARKS & TYE, plaintiffs in error, vs. DAVID BURGHEIM,
defendant in error.

Section 3987 of the Revised Code, requiring the plaintiff in *certiorari* to give the opposite party in interest written notice of the sanction of the writ, and time and place of hearing, at least ten days before the sitting of the Court to which it is returnable, etc., etc., applies to *certioraris* from the Justice Courts, and is still of force under the Constitution of 1868.

Certiorari. Before Judge HOPKINS. Fulton Superior Court, October Term, 1870.

Sparks & Tye sued Burgheim in a Justice's Court; he pleaded a set-off, and obtained a judgment against them. They sued out a *certiorari*, returnable to October Term of said Court. Sparks & Tye's counsel filed exceptions to the Justice's answer thereto. When they were about to argue these exceptions, Burgheim's counsel moved to dismiss the

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certiorari, because he had not been notified of the sanction of the writ, and of the time and place of hearing, ten days prior to the said term of said Court. (It was admitted that such notice was given during said term.) Sparks & Tye's counsel said this motion was out of order. The Court said it was not. They then proposed that time be given to Burgheim's counsel, if said notice was too recent. But this the Court refused, and dismissed the *certiorari* for want of such notice prior to the term. This is assigned as error.

MYNATT & DELL, for plaintiffs in error. Section 3987 not applicable to Justices' Courts. The question is not settled by 34th Ga. R., 122, or 36th, 523. The Act was passed in 1861. Section 3787 applies to Inferior and Ordinary Courts. See rule as to Justices' Courts. Rule S. C., No. 15, "Final Judgment," in section 3995, applies to Justices' Courts: 17th Ga. R., 429. Trial on merits favored: 30th Ga., R., 675-8; 36th, 393. The notice given was substantial compliance: 36th Ga. R., 396. The "time and place" of hearing is fixed by law, for the writ is returnable to term. The ten days means ten before the *hearing*, and not before Court sits.

JOHN MILLEDGE, Jr., for defendant.

MCCAY, Judge.

There is nothing, either in the language nor in the object of section 3987 of the Code to confine its operation to any *particular* writs of *certiorari*. Indeed, the propriety of some kind of notice to the other side is very evident. We think the statute is rather rigid in the consequences which it imposes upon failure, but such is the law, and we are bound by it. We are unable to see why the fact that all writs of *certiorari* are to be sanctioned by the Judge under the new Constitution can affect the question. Notice is just as necessary now as it was when the *certiorari* issued, as a matter of course.

Judgment affirmed.

Powell vs. Boring.

THOMAS S. POWELL, plaintiff in error, vs. JESSE BORING, defendant in error.

1. Where a party upon a motion to open a judgment under the Relief Act of 1868, which was dismissed by the Court, fails to bring up, in the record to this Court, the original record of the judgment moved to be opened :

Held, That, inasmuch as the party alleging error must show affirmatively the existence of the error complained of, this Court will presume, in the absence of the record of the judgment, everything in favor of the judgment, and of the dismissal of the motion.

2. *Held again*, That, where it appears, from the statement of the facts set out in the motion, that the defense to the original suit involved the same issues now involved and presented by the motion, this Court will not set aside the judgment of dismissal.

3. *Held again*, That all motions under the Relief Acts to open judgment, must be confined to the legal equities authorized to be pleaded by said Act, and new matters of defense not embraced in the law are insufficient to predicate such motion upon.

Relief Act of 1868. Equity. Estoppel. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

In October, 1866, Boring obtained a judgment against Powell, upon a contract made prior to June, 1865. (See *Powell vs. Boring*, 35th Georgia Reports.) The debt being still unpaid in May, 1869, Powell's counsel moved to have said cause resubmitted to the jury, under the Relief Act of 1868, that Powell might give in evidence "the consideration of the debt, the amount and value of the property owned by him" when the debt was contracted, "to show upon the faith of what property the credit was given," "the destruction or loss of said property, and how lost or destroyed," "for the purpose of reducing the amount of the judgment rendered, according to equity, and that such a verdict may be rendered as to the jury may appear just and equitable."

Boring's counsel demurred, because there was no averments of the facts expected to be proved. Powell's counsel amended by averring as follows: "The judgment was founded upon

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certain notes, which Boring claimed Powell had bought from him. Boring was a member of the faculty of the Atlanta Medical College, a corporation. He proposed to sell to Powell his interest in the College. There was a misunderstanding as to what that interest was, but this was not developed till Powell had taken Boring's place in the College, in 1858. This contract was made in 1858. Powell thought he purchased only Boring's interest in the building and grounds and his position as professor. But Boring insisted that he sold him also his interest in certain notes in the hands of the dean of the faculty. Powell paid him for his interest in the building and grounds, leaving the matter as to the notes in controversy. In 1861, Boring sued Powell for the price or value of said notes. The notes were for tuition fees of students who had attended the college. In 1866, the said controversy was tried.

The jury found that Powell had bought the notes, and found for Boring for their value, \$1,543 00, with interest. The notes were never delivered to or in any way transferred to or indorsed to Powell, nor has Boring offered to do either. Powell is entitled to have said notes transferred to him before Boring can collect said judgment. Boring is insolvent, and if Powell pays the judgment, he cannot make Boring respond in damages, even if the notes be transferred to him. A failure of consideration was not pleaded in the original suit; "the question seemed to be as to whether he made the contract." For these reasons, he moved to submit the matter to a jury as aforesaid.

Boring's counsel again demurred to the motion as amended, and the Court dismissed it. That is assigned as error.

P. L. MYNATT; TIDWELL, FEARS & ARNOLD, for plaintiff in error. This motion is a substitute for a bill in equity, under the Relief Act of 1868. The remedy sought could only be enforced in equity *after* judgment on the contract. 2 Sm. L. C., 23, 24, 32; 8 M. & W., 872; 15th, 598; 26

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Ga. R., 485. Relief Act of 1868 gives new trial if equity will. 40 Ga. R., 493.

A. W. HAMMOND & SON; L. E. BLECKLEY, for defendant.

LOCHRANE, Chief Justice.

1. This case comes before the Court upon a motion to reopen a judgment under the Relief Act of 1868. The original notice was given April 2d, 1869. At the May Term, 1869, the proper motion, based on this notice, was made, and dismissed 8th December, 1870. The bill of exceptions sets out an amendment proposed orally, in which it is alleged that certain notes, about which the original litigation was had, were never delivered to him, although this judgment which was moved to be opened was recovered against the movant upon the ground that he had purchased said notes. He asks that the matter be submitted to a jury upon the failure of consideration, etc. And avers that plaintiff in judgment is insolvent, and ought not to collect his judgment etc.

It is clear, from this record, that the motion originally made was properly dismissed. It was filed upon the ground of losses, but did not in any way attribute such losses to any act of the plaintiff. The amendment is not germane to the Act of 1868. It set up a defense to the judgment, to-wit : that there was failure of consideration, and asks that it be opened upon that ground. It sets up insolvency on the part of the plaintiff in *fi. fa.*, and therefore virtually asks that he be restrained from collecting the debt. Again, it presents nothing in the Act of 1868 but its form.

We think the Court committed no error in dismissing the whole motion and amended motion in this case.

But the record fails to bring to the notice of this Court the papers and pleadings in relation to the judgment it was moved to open. This Court will presume everything in favor of the judgment of the Court below arising out of the

record when it is not brought before this Court. It is the duty of all parties who allege error in the judgment of the Court excepted to, to make such error affirmatively to appear. How can we know what was contained in the original pleadings and judgment except the record is brought up to be examined and reviewed by this Court? In motions to open or set aside the judgment of a Court it is to be presumed that the judgment sought to be opened is before the Court, that he has the record to inspect, and that his judgment is based upon the record. Now, when the judgment upon the motion is brought up, and it comes without the record, we can only presume that the record, as presented to the Court below, furnished him with satisfactory reasons, based upon legal grounds, for his judgment.

2 and 3. But in this case the motion is not within the Relief Acts, is not based upon the adjustment of equities arising out of the relief provisions. It presents, by way of a bill in equity, an application for a rehearing, and yet upon its face presents such a statement of the original litigation as must have involved the defense set up by the motion, and would be insufficient, as a bill in equity, to invoke a rehearing. Dr. Boring sued Dr. Powell, and the action involved the consideration upon which it was founded if the notes had not been delivered, or, by operation of law, conveyed to him; this was a proper defense to have been made at the time of the suit and upon the hearing before judgment. And the rule laid down by this Court is, that the party is not only estopped after judgment as to matters set up and pleaded, but as to such matters which might have been relied on as a defense. The law does not favor, the negligent; and where there is nothing which is recognized by equity sufficient to account for not pleading such defenses as existed before judgment, the judgment is final and conclusive.

This principle has been solemnly enunciated by this Court, and reiterated as the settled law, so far as defenses are concerned. We may recognize the rule that permits a party

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who has independent claims against one suing him pursuing his legal remedy by a separate and distinct action against him. But if it be a purely legal defense to the action brought he must plead it.

In this motion we see nothing which ought not to have been pleaded as a defense before judgment. And it comes too late to invoke, by a motion based on the Relief Acts, the power of equity to open the judgment or grant the relief sought. And we therefore affirm the judgment of the Court.

C. VAN ARSDALE, plaintiff in error, *vs.* C. O. JOINER, defendant in error.

In an action of trover for a watch, it appeared that the true owner of the watch was the plaintiff—a married woman—that her husband had pawned it to secure \$150 00 advanced to him upon it by the pawnee, that at the time of the pledge the husband had waived, in writing, his right to thirty days' notice, etc., as required by section of the Code, in case the debt was not paid, and that the pawnee, on the failure to pay the loan, had sold the watch, by an auctioneer, to the highest bidder, but without the thirty days' notice to the pawner, and that the defendant was the highest bidder, and was now in possession, and had refused to deliver to the plaintiff. There was evidence that the wife had authorized the husband to raise money on the watch, but there was other evidence contradicting this. The Court charged the jury, that even if the wife had authorized the husband to raise money on the watch, this would not authorize him to waive the provisions of the law, as to notice, and mode of sale in case of default, and that her title would not be divested unless the sale was in pursuance of the statute.

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3. That the plaintiff could recover without paying or offering to pay the money borrowed, even if the husband had authority to raise money by pledging the watch, as the sale was a conversion.
4. That the defendant acquired by his purchase every right of the pawnee, and was entitled to reduce the damages by the amount of money due the pawnee, since, if the husband had authority to raise the money as the agent of the wife, her damages from the conversion was the value of the watch less the money advanced thereon by the agent.
5. That, as there was evidence *pro* and *con* as to the authority of the husband to pledge the watch, it was the right of the defendant to have the law charged to the jury in both aspects of the case, and as the Court charged the jury that the measure of damages was the value of the watch in any event, this was error and the Judge erred in not granting a new trial.

Bailment. Pawn. Husband and wife. Damages. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

Mrs. Joiner brought trover against Van Arsdale for a watch. She proved by her father that he gave the watch to her, that Van Arsdale had it and would not give it up, and that it was worth \$375 00. Mrs. Joiner testified to the same facts, and that she loaned the watch to her husband for a few hours, and he pawned it to some one without her knowledge or consent. Mr. Willis testified that the husband applied to him for \$150 00 and got it by pawning the watch; that when the note was due and unpaid he had the watch advertised, and in seven or eight days it was sold by an auctioneer for \$205 00, which was about its value; the expenses of sale and note were paid, and the balance of the proceeds was paid to the husband. He had represented himself as owner, and Willis knew nothing of his wife's claim till after such sale and settlement, when she told him that the watch was hers, but that she had let her husband have it to raise some money upon. The auctioneer testified to the fairness of the sale, etc., saying the watch was well advertised for five or six days. Defendant's counsel read in evidence the obligation given by Joiner when he got the money. It authorized the

pawnee to sell at public or private sale, or otherwise, at their option, and without notice, if he failed to pay the \$150 00 when due. It was shown that Van Arsdale bought the watch at said sale.

The evidence being closed, defendant's counsel requested the Court to charge the jury, that if plaintiff made her husband her agent to raise money on the property, by pledge, or otherwise, and he did pledge it under such authority, the plaintiff cannot maintain an action for trover for the property until she had paid the debt for which the property was pledged, and thus terminated the bailment. This charge the Court refused to give, and charged as follows: "If it should appear that the watch was given to the wife, it would be her property, and if it was converted by another to his own use, she could sue for the conversion in her own name. If she loaned it to her husband to wear temporarily he would not have the right to pledge it for money, and if he did so, and it was sold to satisfy the debt for which it was pledged, that would not divest the title, and this action could be maintained against the purchaser at the sale if he failed and refused to deliver it after a demand was made for it. If she gave it to the husband for the purpose of raising money on it, and he pledged it to raise the money, and under and according to the law of the State it was sold, that would divest the title, and this action could not be maintained. In order to make the sale valid in this case it must have been sold in public, after reasonable notice to the public, to the highest bidder, and fairly conducted, and after thirty days' notice to the person who pawned it. If you find for the plaintiff, your verdict will be for the value of the property, and to that interest may be added. If your verdict be for the defendant you will simply say so."

The jury returned a verdict for the plaintiff for \$375 00.

Defendant's counsel moved for a new trial, upon the grounds that the Court erred in his charge as to the legal requirements of a valid sale by a pawnee, and as to the

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measure of damages under the facts, and in not charging as requested; and because the verdict was contrary to law, etc. The new trial was refused, and error is assigned on said grounds.

HILLYER & BROTHER, for plaintiff in error. Husband was plaintiff's agent, and had right to pawn the watch: R. Code, secs. 2112, 2168, 2170, 2179. Provisions of sec. 2112, as to sale, are only directory: 27 Ga. R., 167. Damages: Benjamin on Sales, 591, 592.

COLLIER & HOYT; P. L. MYNATT, for defendant. Section 2112 is imperative. Irregularity in non-judicial sales, avoids them: Story on Bailments, sec. 310. If the law was complied with, it would not divest wife's title, because watch was part of her paraphernalia: R. Code, secs. 1779, 1774.

McCAY, Judge.

In one view of this case, it is *all* for the defendant in error. If the watch was hers, and her husband had no authority from her to pledge it, then it is clear that she has a full right to recover its full value, with interest from the date at which the value is ascertained. But there was *some* evidence before the jury that she had authorized her husband to raise money on the watch. This would clearly confer on him the power to pawn it as security for the money; and the defendant in the suit had the right to have the law, in this aspect of the case, presented to the jury. In this aspect of the case, her rights depend upon the fact that the husband was her agent, and she is bound by all his conduct within the scope of his authority. It is a fact that he did not represent himself as an agent, but treated the watch, as well as the contract he was making, as his own. This he had no authority to do. The best that can be said for the plaintiff in error, is, that if the husband had authority to pledge, then the pawnee got every right that authority clothed him with

power to confer, just as though he had acted avowedly as the agent of the wife: Code, section 2148. Suppose he had done this. Suppose he had told the pawnee the truth. "This is my wife's watch, and she has authorized me to raise money on it." Can it be contended that the pawnee was not bound to inquire into the extent of the power? Would not the law be clear that the authority would only authorize a pawn in the usual manner?

What is the usual mode? The pawnee advances the money, and if the debt is not paid as agreed, the pawnee may, on thirty days' notice, sell, etc. The waiver of notice is the exception, (see Code, section 2112) and an exception of very doubtful policy. Indeed, as it seems to us, if the husband had frankly told the pawnee what his authority was, no prudent pawnee would, from that authority, deduce the power to waive the notice.

The agent must act within his ~~authority~~ authority reasonably construed. Code, 2158. This would be a special agency for a particular purpose, and in such cases it is the duty of one dealing with the agent to examine his authority. Code, section 2158.

We concur, therefore, with the Judge, that the husband had only the right, under this authority, to pledge in the usual mode, and that any special contract, different from the usual, ordinary results growing out of a pledge, was beyond his authority.

Hence, the sale without notice was illegal; the title of the true owner was not divested. The sale was a conversion, and the right of Mrs. Joiner to sue was complete. She was not bound, as a condition precedent to her right of action, to tender the money borrowed. The conversion of the property to a use adverse to that she had authorized gives her a right to sue.

But what, in such a case, is the true measure of damages? Is it the value of the watch? Has she been injured to that extent? We think not. She has elected to take damages.

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What damages? Surely only the damages she has suffered. If she clothed her husband with power to raise money on the watch, she has only suffered by the conversion what the watch was worth above the money her agent procured upon it. This is clearly the result of the authorities upon this question: Benjamin on Sales, 592; 15th Mass. Rep., 408.

Whilst, therefore, we concur with the Judge, as to the right of Mrs. Joiner to sue for the conversion, we do not concur in his ruling as to the measure of damages, if the jury should find the husband had authority to raise money on the watch.

Judgment reversed.

JANE FRANK *et al.*, plaintiffs in error, vs. LONGSTREET, SEDGWICK & COMPANY, defendants in error.

1. An irregularity in a second original is not fatal to the suit if the party has had notice. (R.)
2. Where the payee of a note indorses it after maturity, and suit is brought by the indorsee against the makers and indorser, and the plea by the makers sets up usury, and the Judge held such plea by the makers did not affect the liability of the indorser upon his contract of indorsement after maturity of the paper:
Held, That this was not error. The contract of indorsement was a new and distinct contract, not affected by usury between the payee and makers in the hands of the indorsee without notice, and the indorser, in a suit against him by the indorsee, cannot set up his own illegal act in taking usury, to defeat a recovery against himself as indorser.
3. On a note made to be negotiated at a chartered bank, but not so negotiated and held by the payee at its maturity, and indorsed with a waiver of demand and notice by the security, and after its maturity indorsed by the payee, under our law, under 2739th section of the Code, such indorser after maturity, upon suit by the indorsee, is not discharged by failure of proof of "demand and notice," and it was not error in the Court to refuse a non-suit on this ground.
4. In order to render verbal evidence of the contents of the notice required by our law to be in writing and to contain certain facts, even when such notice is out of the jurisdiction of the Court, it is first necessary to give notice to the party or his attorney to produce it.

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5. When the evidence shows that the maker of a note borrowed \$2,400 from the payee, and gave three notes of \$1,136 each therefor, and paid two of the notes, and the payee indorsed the last note to a third party, in the hands of the third party, the note is only void to the amount of usury thereon, and it is not within the purview of the defense of the maker to such note, to set up usury paid upon the other notes to the holder and payee thereof.
3. The evidence being that only \$800 was received upon the note due at twelve months for \$1,136, and \$721 82 was paid at maturity, the difference between \$800 and legal interest for one year, the lawful principal of the note and the payment, is the amount due, with interest, by the maker to the indorser; and we hold that the verdict is in excess of the amount due, under the evidence, and ought to have been for \$134 18, principal, with interest from 15th January, 1868, and direct that the verdict conform to this amount, else a new trial be granted to Jane Frank, the principal, and M. Frank, the security.
7. *Held, again*, Under our Code juries may find equitable verdicts, and the verdict against Guild, the indorser upon the note sued, should stand affirmed.

Usury. Pleadings. Verdicts. Evidence. Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

Longstreet, Sedgwick & Company averred that "Jane Frank, as principal, and Moses Frank, as security, both of said (Fulton) county, and Lewis A. Guild, of the county of Calhoun, as indorser," owed them \$1,136 00, besides interest upon a note payable to Guild, hereinafter described. Second original issued for Guild. In it "both of said county," *supra* was left out. All three were served. The Franks pleaded the general issue; that at the time of making said note, it was agreed with them that Guild should lend to Jane Frank \$2,400 00, upon her making, with Moses Frank, as security, her three promissory notes of that date, each for \$1,136 00, due twelve months thereafter, with interest from date, if not punctually paid within ten days after maturity, thus making the agreed interest at the rate of three and a half per cent. per month; and pursuant to said agreement Guild loaned her \$2,400 00, and she made such three notes. This is one of the three. On the 25th of January, 1868, she

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paid Guild \$1,000 00 in cash and \$860 00 in merchandise; on the 12th of November, 1868, she paid him \$220 20 cash and \$179 80 in merchandise, on said loan. One of the notes was paid at maturity, on the 15th of January, 1868, and they paid on that day, as usury, over principal and interest, \$280 00. The note sued on contained but \$800 00 of legal principal. This they set up as usury, and prayed a judgment against Guild therefor.

Guild pleaded the general issue; that he was discharged because he gave plaintiffs written notice to sue the maker within three months, and they did not do so; that they took said note by his indorsement after it was due, in exchange for certain notes on Mitchell & Company, plaintiffs guaranteeing that Mitchell & Company would never become bankrupt; but they did, and are discharged as bankrupts, and, therefore, the consideration of said indorsement failed.

On the trial, plaintiffs read in evidence said note, and closed. It was as follows: "\$1,136 00. Atlanta, January 12th, 1867. Twelve months after date I promise to pay to the order of Lewis A. Guild eleven hundred and thirty-six dollars, at the Atlanta National Bank, and to bear interest from date, if not punctually paid within ten days after maturity, for value received.

JANE FRANK.

M. FRANK, Sec'y."

Indorsed as follows: "Lewis A. Guild:" "I hereby waive notice and demand, and my liability remains on the within note the same as if it had been duly presented. January 15th, 1868. M. Frank, security." "Received, January 15th, 1868, on the within note, seven hundred and twenty-one and 82-100 dollars."

Defendants' counsel moved for a non-suit because the second original showed no jurisdiction in Fulton county, but averred that all the defendants resided in Calhoun county, and because there was no evidence of demand of payment of said note at said bank, and of notice of non-payment. The non-suit was refused.

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Mrs. Frank testified to the making of the notes as pleaded, and the payments as pleaded, except that she said she also paid Guild \$425 00 on the 16th of November, 1869, and that she took up the other two notes from Guild.

Guild testified that he indorsed said note to plaintiffs after due, in exchange for two notes on Mitchell & Company, with the guaranty that they were not bankrupt, and that Mitchell & Company did become bankrupt without paying him. He further testified that he gave notice to plaintiffs' agent to sue said note, and that he did not do so within three months. The plaintiffs lived in New York, and Guild testified that he wrote giving such notice, and proposed to tell the contents of that letter. The Court would not hear him. Another witness said he knew Mrs. Frank paid Guild \$400 00, but did not say when nor where. Plaintiffs' agent testified that Guild gave him for the Mitchell & Company notes \$100 00 cash, a note on Cowart & Bell for \$400 00, and the note sued on, saying they were good, and that the Frank note was secured by mortgage. He took the Mitchell & Company notes at forty-two cents on the dollar, without any guaranty; he knew but little about their solvency except what Guild said. On cross-examination, he said he had no notice to sue except by a letter exhibited, and it was within three months from the beginning of this suit. Another witness testified that the agent did not make any guaranty to Guild as to the Mitchell & Company notes, that Guild knew they were then bankrupt, and was buying up their paper on speculation.

The Court charged the jury, among other things, that as between the makers of the note and plaintiffs there could be no recovery for whatever usury the proof might show to be in it in the indorser and plaintiffs they (on other grounds) to the extent due on the note at the date of the plaintiffs.

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and \$48 39 interest, and against Guild for \$493 70 principal, and \$97 91 interest; payment of the sums found against the Franks to operate *pro tanto* as satisfaction of the amount found against Guild, and when the amounts found against Guild are paid they will operate as satisfaction of the sum found against the Franks.

Defendants' counsel moved for a new trial upon the grounds that the Court erred on said refusal of non-suit, in not allowing Guild to show the contents of the notice to sue, and in charging as he did; and because the verdict was contrary to the weight of evidence, and is illegal and uncertain. The Court refused a new trial, and that is assigned as error.

M. ARNOLD & R. J. COWART, for plaintiffs in error. Usury vitiates the note both as to maker and indorser: Ch. on B., (11th ed.) 218 and note (*m*); 1st Kelly's R., 406-409; 2 McCord's R., 176; 3d Wend. R., 141. Parol as to notice was admissible because when instrument to be proven is a notice, it need not be produced: 1st Gr. Ev., sec. 561; 2 McCord's R., 134; 2d C., M. & R. Exch. R., 261. And so when paper is beyond jurisdiction: 26th Ga. R., 544; 39th, 241. Appearance and pleading did not waive irregularity in second original: R. Code, secs. 3265, 3259. Guild not liable because no demand at bank: Ch. on B., 358; 9th Ga. R., 303; 14th, 791; 18th, 517; 2 McCord's R., 350; Cons. Ct. So. Ca., vol. 1, page 69; 9th Johnson's R., 12; 3d Wend. R., 79. The verdict was wrong under the evidence.

HILLYER & BROTHER, for defendants. Usury in note cannot affect one who indorsed it after due, under new contract: 1st Par. on Con., 245, 263; Code, secs. 2593, 2609, 2736. No demand on past due paper necessary: R. Code, sec. 2739. Irregularity in second original was mistake of Clerk, and cured by pleading: R. Code, secs. 3456, 3259, 3269, 3409. The notice to sue proposed to be proved immaterial: R. Code, sec. 2128.

LOCHRANE, Chief Justice.

The facts in this record show substantially that Lewis A. Guild had a promissory note, dated January 12th, 1867, due twelve months after date, at the Atlanta National Bank, for \$1,136 00, made payable to him by Jane Frank and M. Frank, as security; that this note was not deposited at the bank for collection, but was in the hands of the payee after it became due, M. Frank, the security, making the proper waiver in writing, in relation to demand and notice, etc. After the note was due, Guild indorsed it and delivered it to the agent of Longstreet, Sedgwick & Company, in trade. These indorsers brought suit upon the note against the makers, in the county of Fulton, and, by second original, upon Guild, in the county of Calhoun.

1. We may here dispose of a question raised in this record upon the irregularity allged to exist in the second original. The declaration filed against Jane and Moses Frank, shows that they both reside in Fulton county, and avers Lewis A. Guild to be a resident of the county of Calhoun. In the second original, the venue is properly stated: Georgia, Fulton county; but omits to recite that Jane Frank and Moses Frank are of Fulton county—but after their names, adds: “And Lewis A. Guild, of the county of Calhoun, as indorser,” etc. This omission is argued to be a fatal variance, etc. We see nothing in this objection. Section 3269, declares: “No technical or formal objections shall invalidate any petition or process; but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded; provided there is a legal cause of action set forth, as required by this Code.” In this case, the parties appeared and pleaded to the action. The maker and security set up usury and payment, and Guild pleaded that he indorsed the note after its maturity, that he gave notice to the parties to institute suit within three months, which they

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failed to do, etc., and also failure of consideration in the property received in lieu of such note and obligation of indorsement, etc. After evidence was introduced, the jury found for the plaintiffs, and a motion for a new trial was made upon several grounds, viz.: 1st. That the Court erred in instructing the jury that the indorser was liable, even if the note was for usury, for the amount of the note. 2d. In not granting a non-suit as to the indorser, upon the ground that the note was payable at a chartered bank, and there was no evidence of a demand and notice upon the makers, etc. 3d. In excluding Guild's testimony, proving notice to sue, the plaintiffs being residents of New York. 4th. That the verdict was contrary to evidence. 5th. Upon the form of the verdict, which was for \$345 66, principal, against the maker and surety, and for \$493 70, principal, against the indorser.

2. We will first notice the liability of the indorser. The proposition relied on is, that the usury vitiated the note, both as to the makers and indorser. Is this the law? We think not. The indorser, by his contract, for a consideration, undertook to pay the note, if the makers did not. And conceding that he had taken this note for usury, he could not set up that to defeat the recovery as against him. In *Marford vs. Davis*, 28th New York, (1st Tiffany,) 481, it is laid down, "An indorsement, as between the indorser and indorsee, is a new and independent contract, having no connection with a usurious contract between the payee and the person discounting it, and is unaffected by it. And it is not competent for the indorser to say that his indorsement is invalid, nor can he, in any event, set up his own illegal act in taking usury, to defeat a recovery against him upon the same instrument."

In *Brown vs. Wilcox*, 15th Iowa, (7th With.,) 414, on a note given for usury, it was held that the indorser was liable to the indorsee, where he could not maintain an action against the maker. In *Mabry vs. Matthews*, 10th S. & M., 323, it

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was held, "Where one knowingly indorses a note, after it has been paid off, he binds himself by such indorsement, and is liable for the amount of the note to the indorsee." In the case in 1st *Kelly*, 406, the principle held does not conflict with the position presented by these cases. As to the maker, after dishonor, the indorser takes the note with all the existing equities growing out of the contract as a defense. But this rule does not apply to the indorsee; he guaranteed the validity of the paper, and is bound upon his contract of indorsement to the indorsee. The indorsement was a new contract: 2d *Kelly*, 167, *Cox vs. Adams*. And we, therefore, hold there was no error in the charge of the Judge, that the indorsee was liable to the indorser upon his contract, even if the note was tainted with *usury* or for *usury*, and such defense availed the makers.

3. The second ground of error is based on the failure of proof, that demand and notice upon the maker and security had been made. We recognize the general rule to be, that, though a note is past due, and indorsed by the payee, it is nevertheless incumbent upon the holder to make demand upon the makers, and give notice of their failure to the indorser; the rule is briefly stated in *Guild vs. Goldsmith*, 9 *Florida*, 212: "An indorsee of a promissory note after it falls due cannot recover from the indorser without proof of demand and notice." The same principle may be found in *Patterson vs. Todd*, 18 *Tennessee*, 426: "The indorsee of an over due, negotiable note is not liable thereon, unless it should be presented to the maker within a reasonable time after its transfer, and notice of non-payment be given to the indorser." In *Hoadly vs. Bliss*, 9 *Georgia Reports*, 303, this Court held that the indorser could waive notice and demand before maturity, but after maturity he may waive *proof* of demand and notice. In 14 *Georgia Reports* proof of demand and notice was held necessary to bind the indorser, and in 18 *Georgia Reports*, 518, Judge Lyon says: "it is an indispensable part of the plaintiff's case; without proof of demand

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and notice he is not entitled to recover.” The cases decided arise under the Act of 1826, and the proposition will not be gainsayed, that as to a note made for the purpose of negotiation, or intended to be negotiated at any chartered bank, and not paid at maturity, notice of the non-payment thereof, and of the protest of the same for non-payment must be given to the indorsers thereon within a reasonable time, or he will not be liable thereon. This is the Code, section 2739. But the question is, conceding that an indorser, after maturity, was entitled to demand and notice, how far binding, under the facts of this case, is the language of our law in section 2739, which concludes, after reciting what is before stated as to notice of non-payment at maturity, etc., “but in no other case and upon no other bills or notes shall notice or protest be held necessary to charge the indorser.” Now, in this case the note was upon its face payable at a bank; the proof is, it was made to be negotiated there. But it was not paid at maturity, and the payee did not present it, but took the waiver of demand and notice by the security, when he indorsed this note, after due and dishonored, in his own hand. Is it within the legitimate inferences of the law that he was to have notice within the section of the Code, 2739, before he was liable on such contract of indorsement? Whatever the failure upon the part of the indorsee to sue, within reasonable time, the makers of the note might work to a discharge of the indorser, we do not think that failure to make demand or give notice to him can so result. This case is peculiar in the fact that the note, though made to be negotiated at a chartered bank, was not so negotiated, but remained in the hands of the payee. It was not paid at maturity, and the waiver of the security of demand and notice of the failure to pay at maturity is entered upon it. We are of opinion that the language of the Code, “that in no other case shall notice be necessary to charge the indorser,” left this case out of the common law principle, and renders it unnecessary to have given him the notice, and we therefore affirm the judgment upon this ground.

4. In the error complained of relative to the exclusion of Guild's proving the fact of notice to sue within three months, we do not think it was error in the Court to have refused the proof. This Court, in 26th *Georgia Reports* 537, have held "when a writing is beyond the jurisdiction of the Court verbal evidence of its contents is admissible;" and in 39th *Georgia Reports*, 242, this Court again said: "The contents of a paper beyond the jurisdiction of the Court, and not in the power of the party wishing to use it, may, without doubt, be proven by a proven copy." But there must be, to let in such testimony, proof, first, that such *notice* or writing was actually served upon the party. *Contents of letters* addressed to them, or sent, without proof of delivery or receipt by the party, would be insufficient. The notice here said to have been given, was under a statute or section of the Code 2128. It may be served upon the creditor, his agent, or person having possession of or controlling the obligation. But the fact of service actually made must precede any proof of the contents of the notice said to be served. And we hold that before evidence could be given of the contents of such written notice required by the statute, it was necessary to serve the party or his attorney with notice to produce the notice, and upon failure then verbal evidence of its contents is admissible.

5. We now come to that part of the case in which we find more difficulty in arriving at a correct conclusion. Was the verdict contrary to the evidence? Mrs. Frank says she borrowed money of Guild; the amount was \$2,400 00 at 3½ per cent. per month; three notes were given of \$1,136 00 each, at twelve months each. She further says she has paid two of the notes. She then details the amounts paid, aggregating over the amount of \$2,400 00 and legal interest. She says the note sued on is all usury. She also says she has paid \$724 00 on this note sued on.

It is evident in the evidence of Mrs. Frank, that she regards the transaction as an entirety, and reasons or rather answers for the reason that, as the original amount was

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\$2,400 00, and she has paid this with legal interest, this note sued on is all usury. But the law does not calculate in this way. In *Primrose vs. Anderson*, 24th Pennsylvania State Reports, (12th Harris,) 215, the law is correctly laid down. "The taking of usurious interest upon one negotiable promissory note cannot be set up in defense to an action upon another such note held by the same person." These notes were neither all usury upon her statement, but each contained *as usury* the amount over the principal and legal interest—thus \$800 00 received would bear interest for twelve months, if due at that time. This would make \$856 00. The amount of the note sued on is \$1,136 00. The balance, or \$280 00, would be usury. If she paid the sum of \$724 82 on the note when due, then the balance due would be \$134 18, and that, *plus* interest thereon since that time, would be her indebtedness; which, by calculation, would show that the verdict as against Mrs. Frank and Mr. Frank was for too large an amount, or an amount not warranted by the evidence, as between her and the plaintiffs. She was entitled to all equities of defense to the note sued on. What usury she may have paid to Guild does not come into her right of equities as between her and the plaintiffs; she is confined to the note and the transactions growing out of the note.

SCOTT, BONDURANT & ADAMS, plaintiffs in error, vs. WILLIAM A. PATRICK *et al.*, defendants in error. (The same parties *vice versa*.)

1. When a suit was brought in a Justice's Court for an amount over \$50 00, and a summons of garnishment issued to a debtor of the defendant requiring him to appear and answer on the day fixed for the trial of the original suit, and the garnishee failed to answer on that day :
Held, That, as by section 3228 of the Code, final judgment cannot go against the garnishee until a term subsequent to that at which he is

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required to answer. It is the duty of the magistrate to continue the proceedings against the garnishee, by formal entry on his docket, to a subsequent day, not less remote than the number of days required by law for the service of the original summons against the defendant in the suit; and any judgment against the garnishee, before the day to which the case is so continued, is illegal.

2. When a *certiorari* has been sanctioned but no notice, in writing, has been given to the opposite party, of the same, ten days before the term to which the *certiorari* is returnable; but it is in writing agreed between the parties that the decision of the Court upon the points made in the *certiorari* shall determine certain other cases suing on the same points, this is substantially a waiver of the notice and an agreement that the *certiorari* shall be decided upon its merits.

Certiorari. Garnishment in Justice's Courts. Waiver. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

On the 13th of December, 1869, W. A. Patrick *et al.* sued Cunningham and Widors before a Justice of the Peace, and sued out garnishment against Scott, Bondurant & Adams, requiring them, as garnishees, to answer on the 14th of January, 1870. On this last day judgment was rendered against Cunningham and Widors, and on the next day judgment was rendered against the garnishees, they having filed no answer. Two days later the garnishees proposed to set aside said judgment, and answer that they owed defendants nothing. But the Court refused. The garnishees sued out *certiorari* to correct this. Several other cases in the same Court were in the same *status*.

No notice of the sanction of the *certiorari* and of the time and place of hearing was given to Patrick *et al.*, plaintiffs below, ten days prior to the term to which the *certioraris* were returnable. But counsel for plaintiffs and defendants in *certiorari* had agreed, in writing, when the *certiorari* was sued out, that "the *certiorari* in this case shall apply in the cases" of " * * * ", the same points having been argued in the motion to set aside judgment, and the same points being involved in these cases as in the within, and that the judgment

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in this *certiorari* by the Superior Court shall hold good in every particular in the cases stated above.”

When the *certiorari* was called for hearing Patrick *et al.* moved to dismiss it for want of such notice of the sanction of the writ, etc. The Court held that this notice was waived by said agreement. Patrick *et al.* assign that as error.

The cause was then argued, and the Court sustained the decision of the Justice. Scott, Bondurant & Adams assign that as error. Here the causes were argued together.

E. P. HOWELL, for Scott, Bondurant & Adams. Garnishees were entitled to twenty days' notice: Acts 1868, 131; and could answer at second term: 15th Ga. R., 187; R. Code, sec. 3228. This Court should so construe the Act and Code as to give garnishees their rights: 39th Ga. R., 34. The agreement was substantial compliance with the law as to notice, etc.: 36 Ga. R., 393.

HILLYER & BROTHER, *contra*. Notice, etc., must be given: R. Code, sec. 3987; 34 Ga. R., 120. The agreement did not waive it: 34th Ga. R., 120; 36th, 393.

McCAY, Judge.

1. The Act of 1869, regulating proceedings before Justices, under the new Constitution, makes no attempt to direct the manner of proceeding against a garnishee. Section 3228 of the Code stands, therefore, unrepealed. That section expressly provides that judgment shall not go against the garnishee if he fails to answer until the second term. It is true that, under the new system the magistrate does not hold his Court on a fixed day in each month for the trial of all cases. But it is true that there is a fixed day for each case. That day may fairly be said to be the term for that case. If it is not tried on that day, a new day is required to be fixed. Why should not that be the second term? We see no special objection to this view. Unless some such view is taken we see

no method of getting a judgment against a garnishee at all, in a Justice's Court. In this defect of legislative provision the Courts must, as section 3185 of the Code directs, furnish remedies according to the right of the parties. We think, therefore, that as the Code, section 3228, gives to the garnishee a continuance till the second term, and the Act of 1869 does not repeal this, he has still this right. The magistrate must continue the case against him to another day. This, in analogy to the time fixed by law for the service, we think ought to be at least as distant as the number of days he must be served previously to the first term. We are aware that this is an arbitrary rule, but as he is entitled to a *term*, we think this is in the *spirit* of the law.

It is to be hoped that the Legislature will provide more in detail for the changes which the new Constitution makes in the duties and powers of magistrates, as it is very difficult for the Courts to harmonize the provisions of the Code with the provisions of the Constitution.

2. The agreement that the other cases should abide by the decision of the Court in this case, was, in effect, an agreement to have *this* case decided upon the question made in all, to-wit: the right of the magistrate to enter up the judgment on the 5th of January. This involves a waiver of any points of form in this case, or any defect in the notice; since it cannot be supposed that it was the intent of the parties to consent that the other cases, in which perhaps, the notice was given, should turn on a point of notice in this case. It was an agreement which involved the idea that this case be decided upon the point of law common to all the cases.

Cameron vs. Akin.

J. D. CAMERON, plaintiff in error vs. WARREN AKIN,
defendant in error.

Upon the trial of a suit at common law upon a note made before June, 1865, the defendant moved to dismiss it on the ground that the plaintiff had not complied with the Act of October 13, 1870, which was overruled by the Court:

Held, That this was error, and, under the facts in this case, Akin being a transferee of the note, was not called upon to go further than show there was a compliance with the requirements of the Act of 1870, by having paid the legal tax due thereon while he held the note, or have otherwise shown no tax was due, etc. WARNER, Judge, dissenting.

Relief Act of 1870. Taxes. Before Judge HOPKINS,
Fulton Superior Court. October Term, 1870.

For the facts see the opinion.

L. J. GLENN & SON, for plaintiff in error.

HILL & CANDLER, for defendant.

LOCHRANE, Chief Justice.

This was a suit brought by Warren Akin against J. D. Cameron, upon a promissory note dated February 27, 1856, which had been transferred by the payees, Black and Cobb, to him. At the trial the defendant moved to dismiss the suit upon the ground that the plaintiff had not filed the affidavit under the second section of the Act of October 13, 1870, which the Court overruled, and the case was submitted to the jury. The defendant offered to prove that he had lost by the results of the war some \$15,000 worth of property, under the sections of the Act aforesaid, which was objected to by the plaintiff on the ground that it was illegal and irrelevant, and that the Act of October, 1870, was void, which objection the Court sustained, and the jury found for the plaintiff. The rulings of the Court are assigned as error.

We think the Court erred in overruling the motion to dis-

miss the case upon the first ground taken. This Court has held the Act of October 13, 1870, to be constitutional, so far as relates to the requirement of taxes due, to be paid, in cases when the debt was held in this State and taxes were due thereon.

The reasons for that decision have been given and we need not repeat them. The only question in this case which may be noticed, is the fact that the plaintiff who brings the action is the transferee of the note sued, and it is argued that he cannot comply with the requirement of the second section of the Act. We see no difficulty under the facts, in his proper legal compliance. The law, in its spirit, only requires from the plaintiff the payment of the legal taxes due by him upon the note, and he can file his affidavit, as to his having paid the legal taxes due thereon since, he has held it; such being the extent of the requirement of the law. And it was the duty of the Court to have received the affidavit of the plaintiff to that effect.

In relation to the second ground of error, we do not now deem it necessary to pass upon it, as the decision of this Court will be rendered in a case heretofore argued upon the constitutionality of the recoupment provisions of the Act of 1870.

We reverse the judgment in this case upon the ground that the Court erred in not enforcing the provisions of the second section of the Act of October 13th, 1870, and dismissing plaintiff's action if he failed to comply with its requirements.

WARNER, Judge, dissented, but furnished no opinion.

Hilburn *vs.* Black.

L. J. HILBURN, plaintiff in error, *vs.* GEORGE S. BLACK,
defendant in error.

When the Court below rendered judgment upon a note made before June 1st, 1865, after overruling the motion to dismiss the suit for non-compliance with the Act of October, 1870, in relation to taxes :

Held, That the Court committed error. WARNER, J., dissenting.

Relief Act of 1870. Tax. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

Black sued Hilburn on his four notes made prior to June, 1865. Hilburn filed no plea. But when Black proposed to take a judgment, Hilburn objected, because Black had not filed any affidavit as to payment of taxes, as required by the second section of the Relief Act of 1870, and moved to dismiss the cause. The Court overruled the motion, and gave judgment against Hilburn without such affidavit having been filed, and without proof that the taxes on the notes had been paid. This is assigned as error.

H. B. DABNEY ; A. B. CULBERSON, for plaintiff in error.

E. N. BROYLES, for defendant.

LOCHRANE, Chief Justice.

This record discloses that Black brought suit against Hilburn upon four promissory notes dated in 1856 and 1857; that at the trial the defendant resisted the right of the plaintiff to a judgment until he had complied with the requirements of the Act of October, 1870, in relation to making and filing his affidavit under the second section, that the taxes due thereon had been paid; that the Court overruled the objection and rendered judgment.

Under the previous rulings of this Court, we hold the Court erred in rendering judgment under the facts in this case.

Judgment reversed.

Mundy vs. Martin.

E. W. MUNDY, plaintiff in error, vs. JOHN G. MARTIN
defendant in error.

When there was a *certiorari* from the County-Court which, under the Act of 1866, Code, 297, is to be heard by the Judge of the Superior Court in vacation or in term, as should to him seem proper, and there was tendered to the Judge in vacation a traverse of the answer of the County Court Judge, and the Judge of the Superior Court thereupon, by written order, directed the papers and the traverse to be transmitted to the next term of the Superior Court for trial.

Held, That this was a judgment of the Judge that the traverse should be tried by the jury, and that, while that judgment stands unreversed, it is error to dismiss the traverse and withdraw the case from the jury on the ground that the traverse was not verified by the affidavit of the party making it.

Certiorari. Practice. Presumptions. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

Martin had judgment against Mundy in the County-Court. Mundy sued a *certiorari* before the Judge of the Superior Court in vacation. He sanctioned the *certiorari*, and ordered the County-Court Judge to answer. He answered, and Mundy traversed his answer. Judge Collier then ordered the papers to be filed in the office of the Clerk of the Superior Court "for trial at the next Superior Court of said county."

At the next term, Judge Hopkins presiding, the cause was called after the juries had been discharged for the term, and in the absence of Mundy's counsel. Martin's counsel moved to dismiss the traverse. This was granted. He then moved to dismiss the *certiorari*. It did not appear by the record that the traverse of the answer had been verified. The Court dismissed it. All this is assigned as error.

R. ARNOLD; H. VAN EPPS, for plaintiff in error. Said order was final till set aside: 9th Ga. R., 117, 247; 20th, 581; 8th, 143; 1 Peter's S. C. R., 340; 10th, 475; Code, secs. 3519, 3773. It must be regularly attacked: 2 Humph.

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R., 302. There must be motion and notice : R. Code, secs. 3533, 3534 ; 40th Ga. R., 359. The law presumes the necessary verification was filed when Collier acted : 10 Peter's S. C. R., 472. After continuance no dismissal without notice : 3d Kelly, 26 ; Code, sec. 3475. There was merit in the cause.

HILL & CANDLER, for defendant. No provision for traverse of County-Judge's answer : Code, sec. 2180. A *Justice's* answer is traversable only by statute and under oath : Code, sec. 3994. There should be damages for delay : Code, sec. 4221 ; 40th Ga. R., 94, 157, 212.

McCAY, Judge.

Were this an ordinary *certiorari*, required by the Code to be made returnable to a particular term of the Superior Court, we should not hesitate to affirm the judgment of Judge Hopkins. In such cases, by section 3992 of the Code, the traverse of the return, properly verified, carries the case, *ipso facto*, to a jury. On the traverse, no order of the Judge is necessary, and when the case is before the jury, it is in the power of the party resisting the traverse to insist upon it, that the issue shall be properly made up.

But the Act organizing the County-Court makes special provisions for writs of *certiorari* : Code section 297. The petition is to the County-Judge, who, on its presentation, certifies up the proceedings to the Judge of the Superior Court in vacation ; the Judge of the Superior Court hears it and decides it in vacation, unless he sees proper to carry it over to term time.

It appears from the record here that on the filing of the traverse, the Judge decided not to hear this case in vacation, but, by a formal order, directed the case and the traverse to be sent to the next term of the Superior Court for trial. In what does that differ from any other interlocutory judgment ? It was a necessary and proper order to be made on the filing

of the traverse, and was doubtless the judgment of the Court on the *status* of the case. The filing of the traverse made the intervention of a jury necessary, and the Judge ordered accordingly.

It is a settled rule that any order or judgment of the Court stands until vacated. The parties had a right to consider the jury trial as settled, so long as that judgment was unreversed, and of a motion to reverse it they were entitled to notice.

The presumption is, at least, *prima facie*, that the verification was attached when the order was passed, or Judge Collier would not have passed it. At any rate, this will be presumed until, by formal motion to vacate the order, it is directly denied.

Judgment reversed.

HENRY KERWICH, plaintiff in error, vs. JAMES H. STEELMAN, defendant in error.

Where upon the trial of an action of trespass *vi et armis*, the plea of the general issue was filed, and, after the case had been submitted to the jury, the Judge charged them that matters of justification could not be considered under the plea of not guilty filed, and the jury found for the plaintiff, and the bill of exceptions assigns error, upon the Judge's charge in the premises, but fails to set out the whole charge, or allege that the charge given was wrong :

Held, That this Court will presume the Court below charged the jury upon the law applied to the facts of the case, and not being excepted to that such charge was correct.

Held again, That it was error in the Court to have charged the jury that they could not consider the fact of justification under the plea of the general issue. By the Code, section 3406, and the rulings of this Court in 9-Georgia Reports, 297, and 12 Georgia Reports, 463, such facts of justification must have been specially pleaded.

Presumptions. Trespass *vi et armis*. Justification. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

Kerwich vs. Steelman.

The facts are in the opinion.

JOHN MILLEDGE, JR. ; M. J. CLARK, for plaintiff in error. Under general issue matters of justification being part of *res gestæ*, are admissible in mitigation of damages: 2d Gr. Ev., 93. If admissible only under special plea, the failure to object when they were offered without special plea waives the difficulty. Objections to evidence not insisted on waived: 27th Ga. R., 125, 131; 22d, 24, 26, 340; 20th, 125, 140. The jury may consider all the evidence before them: 25th Ga. R., 137, 159.

FARROW & THOMAS, for defendant. Matter amounting to justification of battery not admissible under general issue: 1st Hilliard on Torts, 192. Justification must be specially pleaded: 2d Gr. Ev., secs. 92, 98, 274; 12 Ga. R., 463; R. Code, sec. 3406; 9th Ga. R., 297.

LOCHRANE, Chief Justice.

1. This case comes before the Court on motion for a new trial upon the ground of error in the charge of the Judge. The case originated in personal injuries done by Kerwich to one James H. Steelman, for which an action of *vi et armis* was instituted. The defendant pleaded the general issue, and the case was submitted to the jury. The evidence of the transaction was admitted, and the whole case, upon the proof, was presented to the jury. The error complained of is upon the charge of the Judge on the question of justification. The Judge said: "The Court instructs you the matter of justification cannot be considered in this case by you; the plea is that of not guilty, and the question is whether defendant inflicted the injuries. You will look," etc. The jury found for the plaintiff \$132 00 damages. The bill of exceptions does not allege that the charge excepted to was the entire charge given to the jury, but is that which was given upon the subject of justification. We therefore hold that the

case, upon the evidence, was properly given to the jury, with legal instructions by the Court, and the doctrine of provocation and its effect on the mitigation of damages fairly presented. This is the legal effect arising out of the bill of exceptions in this case.

Now, upon the question assigned as error, did the Court commit error in charging the jury that they could not find justification of the act? Under the plea of the general issue, under section 3406 of the Code, we think the Court was right in the charge given. "No other evidence is admissible under the plea of general issue, except such as disproves the plaintiff's cause of action." The rule of the Court in this case in admitting the evidence presented by the record was liberal, and we suppose was induced by the fact that there was no objection to it. Matters of justification ought to have been specially pleaded if relied on. 9 *Georgia Reports*, 297, and 12 *Georgia Reports*, 463. Such facts cannot be given in evidence under the plea of general issue. Again, under the facts in this case, in our opinion, the evidence was insufficient to have sustained the plea of justification. The party was upon the premises of the defendant rightfully; he was in his employment, and when assailed by him could not be held to be a trespasser. Besides the blow inflicted was a severe one; the testimony shows it to have been a heavy blow by the consequences it produced, and we do not think that the general doctrine of a man's right to the peaceful and exclusive use of his own house, and his legal privileges to remove all intruders therefrom and to use the proper and necessary force when necessary, applies to the case at bar. The plaintiff was the servant of the defendant, and, upon his premises, was accused by him with stealing. This accusation ended in the denial by the party, and assertion of his ability to prove his character by some of the best white people in Atlanta. He failed to stop talking when ordered, and was struck over the head with a stick, which caused blood to flow from his ear and nose for some days af-

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terwards. The blow was, we presume, for the humanity of the party, inflicted during a fit of passion. But we cannot conclude that it was justified by the facts presented by this record. And, inasmuch as there was no error in the charge of the Court upon the fact of justification, it not having been pleaded, we affirm the judgment of the Court below.

LYDIA A. SMITH, plaintiff in error, vs. T. C. WILLINGHAM
et. al., defendants in error.

Where, upon notice for a new trial, the Court granted the motion on the ground that the father of one of the parties, and guarantor who had been rejected as a witness upon the trial, had, in the Court room, near to the jury box and within hearing of the jury, talked to another person, who had been a witness on the other side, about the case, and saying, among other things, that if he had been permitted to testify, he would have explained the whole matter, etc., and such fact was unknown to counsel or parties until after the verdict :

Held, That, in view of the necessity of preserving the purity of jury trials, where the Court below who presides at the trial, and whose opportunity of knowing the effect of subtle influences brought to bear upon the jury is better than ours, has granted a new trial under section 3667 of the Code, we will not interfere with his discretion, except in cases of its abuse.

Ejectment. Interference with jury New trial. Before Judge HOPKINS. DeKalb Superior Court. December, 1870.

This was ejectment by Lydia A. Smith against Willingham *et al.*, for the "red-store lot" at Stone Mountain, Georgia.

It was admitted that on the 22d of May, 1851, the title to said lot was in George K. Smith. Plaintiff read a deed made that day whereby Smith conveyed this lot and others and certain personalty to George K. Hamilton.

Plaintiff next put in evidence a deed, whereby Hamilton, on the 2d of April, 1866, conveyed this store lot and the Cloud Hill place to Lydia A. Smith. Pending the trial, it

was shown that Mrs. Smith was Hamilton's daughter, and Hamilton was offered as a witness by her to prove the *bona fides* of his purchase and payment of Smith's debts, etc.; but he was rejected because Smith was dead. The jury found for the plaintiff the premises in dispute, with \$699 37 for *mesne* profits. Defendants moved for a new trial, upon the following grounds, among others: Because Hamilton, in the presence and hearing of the jury, in a loud, feeling and excited manner, talked about the case then being tried, and the facts thereof.

The evidence as to this last ground was as follows: Affidavits by defendants and their attorneys, that they were ignorant of said fact till after the verdict was rendered. Harris, a juror, made affidavit that "during the trial and at the dinner hour of the Court, after all the evidence in the case had been introduced, and the opening argument of one of plaintiff's attorneys, he heard George K. Hamilton, who had been offered as a witness by the plaintiff and rejected by the Court, say that he had paid the last dollar that George K. Smith owed, and that if he, Hamilton, had been allowed to testify as a witness in the case he could have explained the whole matter." These remarks were directed more particularly to B. F. Veal, he and Hamilton being seated at the stove near the seats of the jury in which deponent was sitting. Veal, fixing the time and place as did Harris, made affidavit that in the presence and hearing of several of the jury, Hamilton said to him (Veal) that "he had paid all the debts of George K. Smith that he was to pay when he took a deed to his property, and much more besides, and more than he had made a showing of having paid, and that if he had been permitted to testify as a witness in the case he could have explained the whole matter to the satisfaction of the jury;" that he talked much of the case and its facts, and, in a feeling and excited manner, talking loudly. Several members of the jury were in the box at the time, and Veal and Hamilton were sitting at the stove near the jury box.

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The sheriff made affidavit that he was across the Court-house at the time and heard Hamilton talking, but did not hear what he said.

In reply, Harris made another affidavit that it was when the jury were coming into Court he heard said talking; that the remark had no effect on his mind as a jurymen; the conversation was directed to Veal, and deponent "does not know that Hamilton knew of his being present."

The Court granted a new trial because of "the improper conduct of George K. Hamilton," saying, in his order, "the other grounds stated are not deemed sufficient for granting a new trial." This grant of a new trial is assigned as error.

T. P. WESTMORELAND; A. W. HAMMOND & SON, for plaintiff in error.

HILL & CANDLER; P. B. STEWARD, for defendant.

LOCHRANE, Chief Justice.

In the view we entertain of the main question in this record, we do not deem it necessary to travel through the mass of facts involved. This was an action of ejectment brought by Mrs. Smith for the recovery of property at Stone Mountain. The jury found for the plaintiff, with *mesne* profits, and the question of error arises upon the judgment of the Court granting a new trial upon the third and fourth grounds that relate to the improper conduct of George K. Hamilton. It appears by affidavits appended to the motion for a new trial, that George K. Hamilton, under whose deed Mrs. Smith claimed, and who was her father, and who had been rejected by the Court as a witness upon the trial, while the case was being tried in the presence of the jury, sitting at the stove in the Court-room, near to the jury box, in conversation with one Veal, a witness in the case, talked in a feeling and excited manner about the case, and said in substance "that if he had been permitted to testify as a witness in the case he

could have explained the whole matter to the satisfaction of the jury;" and one of the jurors testifies that he heard the remarks. Out of this interference and irregularity, in presence of the jury, upon the part of Dr. Hamilton, the Court below set aside the verdict and granted a new trial.

The Code, section 3667, provides, "in all applications for a new trial on other grounds not provided for in this Code, the presiding Judge must exercise a sound legal discretion in granting or refusing the same, according to the provisions of the common law and practice of the Courts." At common law mere talking at jurors or in the presence of jurors, as in this case, would have been insufficient to set aside the verdict if it appeared from all the evidence in the case that the verdict of the jury was right. And such has been the general rulings of this Court. In the case of *Glenn, Duffield & Company vs. Salter*, I reviewed the various decisions upon this subject, and I will not here repeat the argument. Our judgment is clear that the granting a new trial on this ground was not an abuse of the discretion vested in the Court below, and except in cases of abuse of discretion vested in the Court charged with original jurisdiction over these matters, this Court will not interfere to reverse the judgment.

We have a full appreciation of the better opportunity the Court trying the case has to understand the effect and influence of parties than a Court of errors, having only the case upon paper; as much is lost in the proper presentation of all the matters transpiring in the Court during the progress of the trial. The jury are, under our jurisprudence, a most important element in the administration of justice. In view of the effect given to their verdicts by this Court, it is more essentially important that their deliberations should be freed from all subtle influences that might prejudice their judgments. And we cannot disturb the judgment of the Court in granting a new trial upon grounds affecting the purity of jury trials, with the view we entertain of the neces-

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sity of maintaining that purity in all its legal guards of law and the usage of the Court. We would be unwilling, in doubtful cases, to control the discretion of the Court below in the premises. When justice has been done and the verdict of the jury is amply sustained by the evidence, and the irregularity of the jury has either been known to the parties before the rendition of the verdict or has been explained by evidence to show the want of intent, this Court has sustained the verdict. But in cases of subtle influence, as by intentional design to put illegal evidence before them, or statements calculated to affect their finding, this Court has not by any judgment pronounced, affirmed the regularity of such acts, but even in cases where the law did not authorize our interference, for irregularity or misbehavior of the jurors, or others towards them, we have asserted the necessity of protecting trials by jury from all sinister interference, and reprobated the acts with the admonition of its evil tendency and effect. In this case we have nothing to say about the other grounds made in the motion. The Court has not passed upon them, and we do not feel called on to do so. The ground upon which the Court granted the new trial, we think, was sufficient in law to have invoked the judgment, and we affirm the judgment upon that ground.

Judgment affirmed.

H. KARWISCH, plaintiff in error, vs. THE MAYOR AND COUNCIL OF ATLANTA, defendant in error.

Where by the petition for *certiorari*, it appeared that the petitioner was convicted before the Mayor and Council of the city of Atlanta, for a violation of the city ordinance against dealers keeping open doors on Sunday, and the proof showed that six or seven persons had gone into the store-house of petitioner upon Sunday, through the back door, and that he was a dealer in liquors and cigars, etc., and the Court refused to sanction the writ:

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Held, That this was not error in the Court. The Christian Sabbath is a civil institution older than our government, and respected as a day of rest by our Constitution; and the regulation of its observance as a civil institution, is within the power of the Legislature, as much as any regulations and laws having for their object the preservation of good morals, and the peace and good order of society: 33 Barbour, 548; 1 Speers, 305. And it is within the right of the city of Atlanta to punish keeping open doors by dealers generally, in the limits of the city upon Sunday, for the purpose of *preventing* the violation of the State laws, as well as preserving the public respect for the Lord's day.

Municipal Corporations. Criminal Law. Sabbath day. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

For the facts, see the opinion.

HENRY JACKSON & BROTHER, for plaintiff in error. Keeping open tippling houses on Sabbath is offense against State, and city cannot punish for it. R. Code, secs. 4493, 4461. Mere change of name affects nothing; 21 Ga. R., 80; 35th, 147; 14th, 8.

W. T. NEWMAN, city attorney, by Z. D. HARRISON, for defendants. Mayor and Council had authority to pass ordinance requiring doors closed on Sunday: City Code, secs. 13, 35, 36, 49, 78; Acts of 1859-63. Even if a crime, special circumstances may give city jurisdiction: 21 Ga. R., 86. City may have *limited* right to punish *crimes*: 28 N. Y. R., 605; 30 Ill. R., 459; 31st, 88 and 499; 31 Barb., N. Y. R., 282.

LOCHRANE, Chief Justice.

This case comes before this Court on the refusal of the Court below to grant a *certiorari*. The petition shows that the plaintiff in error was tried by the Mayor and Council of the city of Atlanta, for the offense of keeping open doors, as a dealer in liquor, cigars, etc., on Sunday. The evidence introduced was of certain parties who testified, that, on Sun-

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day, the 23d day of April, 1871, they went into petitioner's house, through the back door, and went into a room in the rear of the house, when, at the invitation of the owner, the plaintiff in error, they drank some water, some lager beer and other mixed drinks. The party consisted of six or seven. They swore nothing was paid and nothing demanded. The business was proven, and the fact that a high fence surrounded the back part of the store, and that the party resided at the place. The Court convicted him and the Judge refused the *certiorari*.

The question in this case, ingeniously presented by our brother Jackson, is, that the municipal authorities have no power to prevent a citizen from keeping open his door on the Sabbath day, if he keeps a tippling shop. The State law forbids keeping open tippling houses on that day, and the city has no jurisdiction over the offense. This is clearly true. The ordinance of the city, under which this conviction was had, recognizes the fact, and so ordains, "that the Mayor and Council may not punish for violating the State laws on the Sabbath day." This ordinance, it is argued, does that expressly prohibited in this case, by a change of name. In other words, the charge is, keeping open a house where liquors and cigars are sold, on the Sabbath day, and that this is, in effect, punishing for a violation of the State laws as to the Sabbath day. The purpose of the ordinance is to prevent any dealer in any commodity or thing, from keeping open doors on Sunday. And the case is, in law, as if this party kept a store of toys or candies, or boots and shoes. And the offense consists in keeping the doors open on the Sabbath day. Taking this case, as we must, under the ordinance, the party's drinking has nothing to do with it, and his keeping liquors has nothing to do with it. The question solely is, first, whether the City Council have the power to pass an ordinance prohibiting a man, in any business, as a dealer, from keeping his store open on Sunday? and if so, does the proof in this case show it has been done?

The power is collected from the general powers delegated to maintain the good order and government of the city. The power is a very high prerogative, and is supported by the principle involved in the preservation of the *morals* and *duties* of the citizens upon the Lord's day. The State law prohibits the dealer from pursuing his ordinary calling upon the Sabbath day—Code, section 4493—and therefore as section 4461 of the Code provides, “any person who shall be guilty of keeping open tippling houses on the Sabbath day or Sabbath night shall, on conviction, be punished, etc.,” and as the city may not pass an ordinance upon the violation of the Sabbath day, punished by State laws—and both the acts are covered; we are driven to the proposition whether the opening or keeping open the door of a store is an offense or an act capable of being legislated into crime. It is said that inasmuch as he lived in the store he had the right to keep the door open, and as the charge under the jurisdiction of the city is confined to keeping open, that the facts show he is innocent of any crime. The intention with which the door was kept open has been passed upon by the Mayor and Council, and we do not propose to review the decision upon that ground. Nor do we purpose to enter upon the evidence to ascertain if he has been guilty of a higher offense than that charged, to-wit: keeping open a tippling house on the Sabbath day. We understand this question to arise upon the right of the city to punish the keeping open doors by dealers generally, in the limits of the city, upon Sunday, for the purpose of preserving the public respect for the Lord's day, as far as power can compel its outward observance. And in this view of the corporate powers, we think it is competent for the city, by its ordinances, to compel all dealers to keep the doors of their houses of business shut on the Sabbath. This in itself constitutes an offense. It may not be a tippling shop or it may. The party may not be engaged in his ordinary calling, or he may. The ordinance leaves his guilt on these matters to the State laws, but punishes the keeping of

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such stores open as an act independent of the violation of the State laws or Sunday statutes. The ordinance is to protect the people against the violation of the State laws. In *Canton vs. Nist*, 9th Ohio, (N. S.,) 439, a municipal ordinance ordering all shops to be closed on Sunday, except druggists, so far as employed in putting up prescriptions, *and* not excepting all kept open for charity and those kept by conscientious Jews, was held to be invalid."

We do not think that the ordinance against dealers keeping open doors on Sunday can be regarded as affecting conscience or enforcing any religious observance. The law fixes the day recognized as the Sabbath day all over Christendom, and that day, by Divine injunction, is to be kept holy—"on it thou shalt do no work." The Christian Sabbath is a civil institution, older than our government, and respected as a day of rest by our Constitution, and the regulation of its observance as a civil institution has always been considered to be, and is, within the power of the Legislature as much as any regulations and laws, having for their object the preservation of good morals and the peace and good order of society. 33 Barb., 548.

And in the furtherance of the rest and freedom from unallowed worldly employment ordained by the Sabbath, it was held that the 2d section of the South Carolina Act of 1837, prohibiting the keeping open any store, etc., on the Sabbath day, was a Constitutional act, and indictment sustained upon it: 1 Speers, 305. We hold that the city, by its grant of powers from the Legislature, had the right to pass the ordinance in question, and therefore affirm the judgment of the Court below.

Judgment affirmed.

ASBURY H. POWERS, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. The offense of incestuous fornication is not a joint offense under section 4459 of our Revised Code, and one person may be indicted and found guilty thereof.

2. Where, on a trial for incestuous fornication of A with his sister, the sister was introduced as a witness, and on cross-examination she denied that one Powers (her brother-in-law,) had sued the defendant in her name, and the Court permitted proof to be made that a suit was pending in her name by Powers as her next friend, but refused to permit the declaration and accompanying papers to be read to the jury:

Held, That this was not error, as the contents of the paper were not material to the issue, which was simply whether or not a suit had been brought by Powers in her name.

3. When a written request was made by the defendant's counsel to the Judge to charge the jury, which request covered the whole case, and the Judge in his charge failed to follow the language of the request, but charged the law properly upon the points made, and upon the whole case, and the defendant was found guilty:

Held, The section 8664 of the Code, providing that a new trial *may be granted* on the refusal of the Judge to charge a pertinent charge in the language requested in writing, is not mandatory, but permissive only; and when the Judge has, in fact, charged the language correctly on the points covered and upon the whole case, and has refused a new trial, this Court will not, for this reason only, grant a new trial.

4. No precise rule can be laid down here, for the evidence of an accomplice in a felony must be corroborated by another witness, or by circumstances; but a defendant cannot complain of the charge of the Judge on this point who tells the jury that the evidence of the other witness, or the corroborating circumstances must be sufficient to satisfy them beyond a reasonable doubt of the guilt of the prisoner.

5. In this case, while we are not entirely satisfied with the verdict, yet, as the case turns mainly upon the credibility of the witnesses—a matter specially within the province of the jury—and as the Court below has refused a new trial, we do not think it our duty to interfere with his judgment.

Criminal Law. Before Judge HOPKINS. DeKalb Superior Court. April Term, 1871.

Powers, alone, was charged with "incestuous fornication," in that, on the, etc., being an unmarried man, he had carnal

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knowledge of Amanda Powers, an unmarried female, who was his sister. Upon arraignment, he demurred to the indictment upon the ground that said offense is a joint offense, and no provision was made by law for a separate indictment therefor. The demurrer was overruled. On the trial Amanda Powers testified substantially as follows: She lived now with her brother-in-law, Reeves, but in 1869 lived with her brother, the defendant. In December 1868, defendant had carnal knowledge of her against her will, and continued to have till March 1869, when she left his house. She had a child, the fruit of this intercourse, in November 1869: it is alive. She made certain contradictory statements as to dates, etc. There was an attempt to show an improper intimacy between her and one Burdett, but she denied it. She said she did not tell any one about the matter till she moved to Reeves'. She denied having been willing to settle for \$1,000; said Reeves was not trying to get money for her; she did send Ramsey to defendant; and he has not been representing her to get money from defendant. She said she sued her brother after she was twenty-one years old, in her own name; that she is now twenty-four years old. She denied having told Ann Corley, just before she left for Reeves' that she had never had criminal intercourse with defendant, and that Burdett got it up to disgrace her; and she denied telling her and Miss Gardner so after that; she said she never told anything of the kind. She said she had never gotten any part of her father's estate, that defendant was her guardian, and as such she sued him; that is the suit pending.

Her uncle, Burdett, father of said Burdett, testified that in November 1868, about daylight, he was passing defendant's and through a crack of the house saw him over Amanda, with his pants off, trying to have carnal knowledge of her, heard her insist that he should not, and him say he would, and witness passed on, and did not mention it to any one, neither to his wife nor any member of the family, nor to any one till the Spring of 1870. He admitted that he and

defendant had had a quarrel and had not spoken to each other for a long time. The State proved that she and defendant were unmarried, and closed. Mrs. Corley and Mrs. Gardner testified that Amanda did tell them at said times that her brother had never hinted such a thing as carnal intercourse with her, and they testified that they would not believe her on oath, because of her bad character. And Mrs. Gardner testified that from the general character of the witness, Burdett, she would not believe him on oath. Three other witnesses, akin to defendant, testified that Burdett's and Amanda's characters were so bad that they were unworthy of belief on oath. Defendant's counsel offered in evidence an action by Amanda, by Reeves as her next friend, against defendant for trespass in violently having carnal knowledge of her, begun in September 1870, with a garnishment founded upon it, in which Ramsey stood Reeves' security for costs and damages. The Court permitted so much of it to be read as showed when it was begun.

In rebuttal, four or five witnesses sustained Burdett as a man of such character as that his testimony should be believed, and several of them so sustained Amanda. Defendant stated that the charge was false, that he had whipped Amanda because she would go to Burdett's against his orders, and this raised them against him. His counsel requested the Court to charge as follows: "In criminal cases, a preponderance of testimony is not sufficient to authorize a verdict of guilty. Preponderance of testimony is sufficient in a civil case, to produce mental conviction, but in all criminal cases, a greater strength of mental conviction is necessary to justify a verdict of guilty. In this case, if you have a reasonable doubt growing out of the evidence, as to the prisoner's guilt, you are, under the law, bound to give him the benefit of such doubt, and return a verdict of 'not guilty.' You are not authorized to return a verdict of guilty without *plain and manifest* proof of the prisoner's guilt. In this case, entrusted as you are with the administration of public justice,

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on the one hand, and the liberty and honor of the prisoner, on the other, your duty calls on you, before you pronounce a verdict of condemnation, to ask yourselves whether you are satisfied, beyond a reasonable doubt, that the prisoner is guilty of the offense alleged against him in the indictment. In criminal cases, the guilt of the accused should be fully proved. Neither a preponderance of testimony, nor any weight of preponderant evidence, is sufficient, unless it generates *full belief* of the prisoner's guilt, to the exclusion of all reasonable doubt. If such reasonable doubt is created, it is the duty of the jury to acquit. In criminal cases, charging the prisoner with a felony, the testimony of an accomplice is not sufficient to authorize a verdict of guilt. Before the jury can convict upon the testimony of an accomplice, there must be other testimony in corroboration of the facts testified to by the accomplice. In all felonies where the only witness is an accomplice, unless such witness is corroborated by circumstances, the jury cannot find the accused guilty; there must either be another witness to the same facts, or corroborating circumstances. (Where the only witness in a criminal case testifies falsely to a leading fact, respecting which there could be no mistake or misapprehension, such witness being corroborated by another witness or circumstances as to immaterial matter, will not restore the witness to credit, or authorize a conviction upon the evidence of that single witness.) If a witness swear *wilfully* or *knowingly false*, even to a collateral fact, such testimony ought to be rejected *entirely*, unless it be so corroborated by circumstances or other unimpeached evidence, as to be irresistible."

The Court charged the jury as follows: "The defendant begins the trial with a presumption of innocence in his favor, and that presumption continues until it is removed by proof. The proof must satisfy you, beyond a reasonable doubt, of his guilt. If there is a reasonable doubt resting on your minds—a doubt that is reasonable and grows out of the testimony, and leaves the mind wavering and unsettled—it is

your duty to acquit him. Absolute certainty is not to be attained by judicial investigations; a moral or reasonable certainty is all that the law requires, and all that is attainable. Still, the defendant's guilt must be made plainly and manifestly to appear; it must be shown beyond a reasonable doubt before you can convict. If you should find from the testimony, that the witness, Amanda Powers, voluntarily contributed or aided in the perpetration of the offense with which the defendant is charged, you cannot convict on her testimony alone, but in that case there must be another witness or corroborating circumstances, and this additional testimony or corroborating circumstances, must be sufficient to satisfy your minds, beyond a reasonable doubt, of his guilt. If a witness swear wilfully or knowingly false, to any fact, he is not to be believed, and the facts stated by him must be shown to be true by other testimony before you would be authorized to believe them. If witnesses are impeached by proof of general bad character, by proof of contradictory statements, or otherwise, they may be supported by proof of general good character, and their credibility is a question for the jury. It is for the jury to determine whether they are to be believed."

The jury found the defendant guilty. His counsel moved in arrest of judgment, upon the grounds that said offense was joint, and defendant could not be indicted separately therefor, and because the charge did not constitute incestuous fornication. This motion was overruled. They then moved for a new trial, averring that the Court erred: 1st, in overruling said demurrer to the indictment; 2d, in refusing to allow the suit against defendant and the garnishment papers, to be read to the jury, to show the character of the suit; 3d, in refusing to charge as requested; 4th, in refusing to arrest the judgment on the grounds taken therefor, and 5th, because the verdict was contrary to law and the evidence, etc. The Court refused a new trial, and error is assigned on said grounds. He was sentenced to three years imprisonment.

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HILL & CANDLER, for plaintiff in error. The demurrer was well taken : R. Code, secs. 4459, 4460 ; 18 Ga. R., 264. The whole record was admissible: R. Code, secs. 3663, 3815, 3820. The Court should have charged as requested : R. Code, secs. 3696, 3664 ; 3 Gr. Ev., sec. 29 ; 22 Ga. R., 235. The charge as given was wrong in part 2d : R. Code, sec. 3702 ; 2 Russell on Cr., 960. So it was in part 3d : 23 Ga. R., 297, 576. The motion in arrest was good: 38 Ga. R., 573.

E. P. HOWELL, Solicitor General ; HILLYER & BROTHER, for the State. Demurrer was bad as to the charge: 12 Ga. R., 323 ; 15th, 241 ; 22d, 235.

McCAY, Judge.

1. Nothing can be plainer than that the crime of incestuous fornication is, by our statute, *not* a joint offense. The words are, "*any person* who shall commit incestuous fornication." By what rule of construction this can be made to mean, "if any two persons shall," etc., we are unable to see. The very next section of the Code, section 4460, punishing *fornication and adultery*, *does* make a joint offense, and uses very different language. "Any *man and woman* who shall," etc. It is hardly supposable that language so different should be used in almost the same sentence without a special intent. And there is great propriety in the distinction. The unnatural crime, prohibited in section 4459, as experience shows, is generally the act of a man upon a woman, over whom, by the natural ties of kindred, he has almost complete control, and generally he alone is to blame. There is a *force* used, which, while it cannot be said to be that violence which constitutes rape, is yet of a character that is almost as overpowering. Indeed, if it were necessary to make out a case of mutual consent, (and without this there is no joint offense,) we think but few cases of this unusual crime would be punished.

2. The only statement of the witness that made the proof

of the pendency of the suit, in the name of the witness, by her brother-in-law, as her next friend, evidence at all, was that no such suit had been brought; that there was a suit in her own name, and not brought during her infancy. The proof of the pendency of the suit contradicted her statement, and the *contents* of the paper would have added nothing to the evidence *contradicting* the witness.

Nor was it a matter of much moment any way. She was, in fact, the plaintiff, and it would be a very harsh construction to hold her to have sworn falsely, because she did not know that her brother-in-law's name was used as her next friend.

3. The request to charge is not specially objectionable, save that it proposes to do a good deal more than is necessary to get the law to the jury. The illustrations it gives are, doubtless, true, and its distinction between civil and criminal cases is not illegal. But the charge of the Judge, as given, covers all the points made in the request, and is a fair and just explanation of the law to the jury. A refusal by the Judge to give in charge to the jury a pertinent legal written request is, by section 3664 of the Code, a ground for a new trial. But it is not error *per se*; as though he had expressed an opinion as to what was proven. A new trial may be granted for the error. It stands, therefore, like other errors. If they be material a new trial will be granted. But if they be immaterial this Court will not play at justice by making them material, and granting new trials for their correction. As we think no harm was done, and the prisoner lost nothing but the language of his counsel, we will not, for this reason, hold that the Judge ought to have granted a new trial.

4. The law does not and cannot lay down any rule to measure the extent of the corroboration necessary to support the testimony of an accomplice in a felony. The statute says, section 3702, in effect, that there must be another witness or corroborating circumstances. In this case there were many corroborating circumstances. The girl had a child,

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the parties were living alone in a house with but one room ; they had been seen under circumstances indicating an intention on his part to commit this crime, if he could, and the Judge was very favorable to the prisoner—more so, we think, than strict justice required, when he told the jury that the additional witness, or circumstances of corroboration, must be such as to satisfy them beyond a reasonable doubt that the prisoner was guilty.

5. The evidence was pretty strong, going to discredit both of the witnesses, and we incline to think the preponderance was against them. But the credibility of witnesses is specially matter for the jury, and we are all aware how female witnesses are disposed to visit their direct condemnation upon a sister's fall. We do not feel it to be within our province to interfere in a case turning so completely upon the credit to be given to the witnesses as this. The mode of testifying—the tone—the look—the emphasis, given to words and that judgment of a witness which can only be formed upon what occurs, that cannot be reduced to writing, were all before the jury, and are not and cannot be before this Court.

Judgment affirmed.

J. M. B. CARLTON, plaintiff in error, *vs.* **ANNIE E. CARLTON**, defendant in error.

1. Where in a libel for divorce, the Judge, after an examination in the cause and circumstances of the separation, and of the ability and unwillingness of the husband to pay, grants temporary alimony, this Court will not control his discretion, unless that discretion be abused.
2. In determining the amount of the alimony, the Court may look into the property controlled by the husband, his ability to make an income, and determine from all the circumstances what is a reasonable sum to be paid as temporary alimony.
8. An attachment for contempt, in refusing to obey an order of the Judge to pay a certain amount of temporary alimony, is not prohibited by that clause of the Constitution of 1868, abolishing imprisonment for

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debt. And where the Judge has fully examined the ability of the party to pay, and has reason to anticipate his disobedience to the order, he may direct that if the money is not paid attachment for contempt shall issue.

Alimony. Imprisonment for Debt. Contempt. Before Judge HOPKINS. Fulton County. Chambers. July, 1871.

Said parties married in March, 1869. In July, 1870, she sued him for a divorce, a *vinculo matrimonii*. The ground was cruel treatment. She appended to her libel a schedule of his real property, valued at \$5,600 00, and of personalty, valued at about \$250 00. In August, 1870, Judge Lochrane, then presiding, granted her \$30 00 per month from the 1st of June, 1870, the date of separation, for temporary alimony, and \$150 00 cash, as counsel fees. He took the matter to the Supreme Court for review. There it was dismissed because prematurely brought up. Meanwhile she filed a bill to enjoin him from conveying away certain of said realty and to set aside a conveyance of part of it already made to his brother.

Failing to pay, Carleton was called on, by Judge Hopkins, then presiding, to show cause why he should not be attached for contempt. He answered, setting forth his failure to get a hearing in the Supreme Court, averring that he had no property, was a laborer at \$25 00 per month, and that his wife was not, under the circumstances of the separation, entitled to any alimony, and prayed a modification of Judge Lochrane's order. The cause was heard in July, 1871.

Mrs. Carleton showed that she was living with her father, who was old, had a large family and but little means; that she had syphilis, contracted prior to her separation, (of which she was ignorant when she sued for the divorce), that it cost her \$28 00 per month to have medical treatment therefor. She showed that the rental of the realty in the schedule was nearly \$1,000 00 per *annum*. She testified to the alleged acts of personal violence upon her by her husband.

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Her brother testified that he heard her husband say, before the separation, that he would sell his property or fix it so that she could get none of it, and then leave her, and that, after the separation, he heard defendant's brother say that she need not sue, for the defendant had so fixed his property that she could get none of it. It was shown that defendant was a good business man, and that he ought to command \$1,200 00 *per annum* as a clerk.

On the contrary, defendant and his brother testified that so much of the realty which was conveyed to his brother was so conveyed six months prior to the separation, *bona fide*, for valuable consideration, and showed how it was paid for. As to the other lots, he showed that they belonged to his former wife, and testified that prior to his marriage with this former wife he agreed verbally with her that all *that* property should ever be held by him in trust for her and her children; and she left a son, still surviving; he had always given it in for taxation as trust property, and never claimed it as his own. He testified that this suit and the talk about him had rendered him unable to get work, and that he had been employed but part of his time, and first at \$50 00 per month and then at \$25 00 per month. He said it took all of this to support himself. The evidence as to what was necessary to support his wife ranged from \$12 00 to \$30 00 per month. He said that her counsel had sued out a *fi. fa.* upon the former order and it was levied upon part of said realty, but it did not belong to him. He denied ever having sexual intercourse with any other woman during his cohabitation with her; denied ever having any venereal disease; denied having stated what her brother had sworn to, and stated that he had never acted cruelly towards his wife, but had been kind and indulgent to her, etc. And an affidavit of their negro servant supported this last assertion. The Chancellor ordered him to pay, within five days, \$75 00 for attorney's fees, \$100 00 for past alimony, and \$20 00 per month for future, temporary alimony, and upon failure to comply with any part of this order that he be committed to jail.

The law having been changed, he brought this up for review. He averred that the Chancellor erred in fixing said sums, because he had demonstrated his inability to pay alimony and attorney's fees, and in ordering him to jail if he failed to comply, especially when a *fi. fa.* had been issued to collect said original amount and was levied upon property.

GARTRELL & STEPHENS; THRASHER & THRASHER, for plaintiff in error.

MYNATT & DELL, for defendant. This parol agreement does not save the defendant: R. Code, sections 1944, 1765, 1771, 2242.

McCAY, Judge.

1. The granting of temporary alimony in a divorce case is specially in the discretion of the Judge. The statute, Code, sections 1733, 1736, clothes him with power to examine into the whole matter, and to grant such alimony or to refuse, accordingly, as, from the circumstances of the separation and the ability of the parties, he shall judge proper. His judgment is not even final, but is, at any time, open to modification and re-examination by him. The nature, too, of the case demands that the affair shall be specially in his control, since the very daily sustenance of the wife is involved in its prompt adjudication. If subject, for slight causes, to review in this Court, it would be of little value, since, in its very nature, it is only temporary, and the very *interregnum* it is intended to cover, would be frittered away in litigation over it. For these reasons we feel it to be not only the law, but public policy, that this Court shall only interfere when there has been some clear abuse of power by the Judge.

2. We do not think this is such a case. The conduct of the husband has, as we think, been such as to call for but little sympathy; nor does the showing he makes at all excuse either his conduct towards his wife, or his failure,

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promptly, to obey the former order of the Court. Nor does his extraordinary devotion to the parol contract with his first wife strike us as worthy of nearly so much consideration as his counsel seem to think. We cannot but suspect that the pressure of present circumstances has much to do with this conscientious adherence to his promises, and we do not think the Judge erred in not giving it full consideration. We do not decide upon the validity of this parol marriage settlement, nor determine how far the present wife stands upon the footing of any other person who has dealt with the husband, as regards the effect of a parol agreement of this character. We simply say that the Judge has not, in our judgment, by his order, infringed upon any of the legal rights of the child of the first wife, and that there is sufficient in the whole case to justify the alimony granted.

3. Nor do we think section 18 of Article I., of the Constitution of 1868, abolishing imprisonment for debt, takes away the power of the Judge to commit to jail for contempt. Indeed, section 17 of the same Article, seems to imply the contrary, since it makes it the duty of the General Assembly to limit the power of the Courts to punish for contempts. We do not intend to say, that simply because a debt is adjudged by a decree in chancery, instead of by a judgment at law, it may therefore be enforced by imprisonment. The imprisonment must be clearly for the contempt of the process of the Court, and be of one who is able and unwilling to obey the order of the Court. It must be remembered also, that the imprisonment by a Judge for contempt, is always conditional, and is at his discretion, and may, at any time, by the same discretion, be discharged. And very clearly, it ought never to be resorted to, except as a penal process, founded on the unwillingness of the party to obey. The moment it appears that there is *inability*, it would clearly be the duty of the Judge to discharge the party, since it is only the contempt, the disobedience upon which the power rests. Ordinarily, it would be improper to include in the

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order for alimony, the alternative order for imprisonment, on failure, since it is not to be presumed that a contempt will ensue. In this, case, however, we think it was justified. The defendant below had refused to obey a former order, and his whole conduct indicated very clearly that nothing but the stern order of the Chancellor to commit him on his disobedience, would bring him to the performance of what is his clear duty in the premises.

Judgment affirmed.

JOHN PURYEAR, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where, on the trial of a party charged with violation of the section 4454 of the Code, the Judge charged the jury in effect that army repeaters, having taken the place of horseman's pistols, were to be regarded within the exceptions of the statute, while used by parties on horseback, and the jury found the defendant guilty, and a motion made for a new trial was overruled by the Court:

Held, That the charge of the Judge was as favorable to the prisoner as the construction of the law would warrant; horseman's pistols excepted in the Code having gone into disuse, and a pistol known as an army repeater having taken its place, if the latter was worn by parties on horseback in the same way as the former, we do not see but a fair interpretation of the law might bring it while so worn within the exception. But certainly not farther. And the evidence in this case shows that it was worn upon the person concealed, it was not error in the Court to refuse a new trial.

Concealed Weapons. Construction of Statutes. Before Judge HARVEY. Walker Superior Court. August Term, 1870.

The necessary facts are in the opinion.

WILLIAM H. DABNEY, for plaintiff in error.

C. D. FORSYTH, Solicitor General, by J. W. H. UNDERWOOD, for the State.

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LOCHRANE, Chief Justice.

This case comes before the Court upon error assigned to the charge of the Court, under section 4454 of the Code. The prisoner was indicted for carrying a pistol concealed, and the defense set up was, the pistol he had was an "army repeater," and that this class of pistols had taken the place of "horseman's pistols," which were excepted by the Code. Upon the trial the Judge charged "the law against carrying concealed weapons, excepted horseman's pistols, when that law was enacted. Such army repeater may be a horseman's pistol, the carrying of which concealed is not in violation of the law: *provided*, it is so carried by a horseman, a person connected with some military organization, which usually goes mounted on horseback, or cavalry company; but it is necessary that he should be such a horseman, in order to constitute an army repeater, carried by him, a horseman's pistol, in the meaning of that law, and to justify him in carrying it concealed. Proof of guilt is not confined to the day mentioned," etc., etc.

A motion made for a new trial was overruled by the Court, and we are called on to review the charge of the Judge. The case turns upon the section 4454 of the Code; for the proof shows that the prisoner did carry an army repeater concealed, and the language of the Code is, "any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman's pistols,)" etc., "shall be guilty," etc. This Act does not except anything from its operation but a "horseman's pistol." Army repeaters or navy repeaters are not excepted, and we think the Court gave a very liberal charge to the jury in favor of the prisoner, under the facts in this case. It is true, that it is the *weapon* which the law excepts, and not the fact of its being carried upon horseback. But while this is true, the fact of this class of weapons having taken the place of horseman's pistols, which were excepted, if the jury believed

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that they were worn in the same way, and took the same place, and the horseman's pistol took its name from being worn in riding, and carried in holsters, we can see how the Judge could limit the application of the exception of the statute to them, while so worn and used, but no further. We concur in affirming the judgment of the Court refusing a new trial, for the evidence shows that this army repeater was worn upon the person concealed, and does not fall within the exceptions of the statute. We are indisposed to extend, by construction, the terms of the Code upon this subject. This pernicious practice has been the fruitful source of the most wicked and unwarranted crimes, and believing as we do in the policy of the law, we will throw no obstacle in the way of its thorough and proper enforcement. To detail the calamities that have flowed from the carrying concealed weapons, would disclose scenes of heart-rending agonies to innocent families, whose protector on the one side has been immured in a dungeon, and on the other carried, from dissipation, to a premature grave. The Legislature would wisely consider the propriety of presuming against parties violating this law, malice in all cases of homicide committed by them, and deny bail until the trial, except in cases provided for specially within the Act itself, or to take away the privileges of voting or holding office by such parties. Experience upon the Bench has demonstrated the evil of the practice, and the necessity of additional legislation, either this or a total repeal of the Act, so that all may stand on a common footing of self-defense. As the law operates, one person, obeying the law, is at the mercy of another violating it. I would prefer to see the superadded penalties for its violation, and new modes prescribed for its more general enforcement.

Judgment affirmed.

Cruger vs. Clark.

NICHOLAS CRUGER, plaintiff in error, vs. C. M. CLARK, defendant in error.

When a question of fact has been fully submitted to a jury, who have found a verdict, and the Judge below refuses a new trial, this Court will not reverse the judgment unless there be a very strong case against the verdict.

New Trial. Before Judge VASON. Dougherty Superior Court. December Term, 1870.

This record is somewhat confused. The litigation was begun by a distress-warrant against Martin & Erdman, for \$51 50, sued out in the County-Court, on the 16th of August 1867, by Pulk Robenson, for the use of C. M. Clark. What counter-affidavit was filed does not appear; but a trial was had at September Adjourned Term, 1867, and resulted in a verdict for said plaintiff against Martin & Erdman, for said amount. From this an appeal was taken. Martin & Erdman deposited with one Campbell \$200 00 to await "the termination of a suit on distress-warrant, Pulk Robenson, for use, etc., vs Martin & Erdman, pending on appeal in the Superior Court of said county." At June Term, 1868, the Court ordered this money put into the hands of a Receiver. At December Term, 1869, "Martin & Erdman having no further interest in the suit," Clark and Cruger were at issue as to which of them should have said \$200 00.

It was admitted that George F. Robenson owned the house and had rented it to Pulk Robinson for 1867. Pulk Robenson testified that he "had the renting of said house" during 1867, and rented it to Martin & Erdman, at \$33 33 $\frac{1}{3}$ per month, on his own account, and not as agent. He said he did not borrow any money from Cruger in 1867, but did borrow some in 1866, and gave George F. Robenson as his security. He said he transferred his rent claim to Clark, and to no one else. Here Clark closed.

Erdman testified that he rented the premises from Pulk

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Robinson ; that between January and May, Cruger presented to him the original lease, and said that Pulk Robenson had transferred the rent to him, and thereupon he agreed to pay Cruger the rent after deducting \$125 00 which Pulk Robenson owed Erdman. Six or eight months rent was then due.

After that, Erdman conversed with Pulk Robenson, who was not present at said agreement with Cruger, and from it understood that he knew of the transfer to Cruger. Cruger testified that he loaned Pulk Robenson \$200 00 and took a transfer of said lease as security, and related the conversation between him and Erdman as Erdman had, adding that Pulk Robenson was present when it occurred. And Cruger and several other witnesses testified that Pulk Robenson was a worthless fellow and unworthy of belief. He then put in evidence a lease of the premises, made the 3d of December 1866, for the year 1867, from Pulk Robenson to Martin & Erdman at \$400 00, and a transfer of the rent due on said lease from the 1st of June 1867, to the 1st of January 1868, by Pulk Robenson to Clark, to secure money loaned. He also put in evidence a note for \$200 00, made December 4th, 1867, by both of said Robensons to Cruger, payable sixty days after date, and a transfer of \$200 00 of said rent money to Cruger, made on the 4th of December, 1867, by George Robenson, in which he stated that Pulk Robenson had rented the premises, as his agent. (It was said that "December 1867" should be "December 1866.") Cruger testified that he took this paper from George F. Robenson, on the advice of his counsel.

The Court charged the jury that he who had the first order for the money was entitled to it; told the jury how a witness might be impeached, and that if he were so impeached they should give no weight to his testimony. The jury found for Clark. Cruger moved for a new trial upon the grounds that the verdict was contrary to the evidence and the charge of the Court, and because a juror who tried this issue tried the original issue in the County-Court. Cruger

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swore that he did not know this last fact till after the verdict. The Court refused a new trial, and that is assigned as error.

SMITH & JONES; HINES & HOBBS, for plaintiff in error.

D. H. POPE, for defendant.

MCCAY, Judge.

It would be hard to say that a verdict for either of these parties would, under the evidence as set forth in this record, be contrary to the evidence. As it is, we incline to agree with the jury. Admitting that Cruger advanced his money in December 1866, nothing seems to have been done to secure him but to deposit the lease in his keeping. By section 1978 of the Revised Code, the equitable mortgage arising from the deposit of title deeds is abolished, so that Cruger got no right in this debt by the deposit. The transfer to Clark was made in August. This transfer was by the apparent owner. At any rate, the contract of the tenant was with Pulk Robenson, and *prima facie* he had a right to transfer. It is true it is part of the admission in the issue that the real owner was George F. Robenson, but unless it be shown that Clark knew this at the time he advanced his money and took the transfer, we think he got a good title to the debt. The fact that the lease was, at the time, under deposit with Cruger, could not affect the matter. The date of the deposit with Cruger of the lease does not appear.

It is said by the witness that at the time there was eight months rent due; whether this means eight months of the year had elapsed or were yet to elapse, is not clear. We should understand that eight months had elapsed. This would make Cruger's transfer subsequent to Clark's. The written transfer was not till December, 1867. It may be true that the elder Robenson acted in bad faith to the son in the transfer to Clark, but as he was the nominal owner of the debt for the

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rent, Clark had a right to deal with him as the true owner, without notice to him that the younger Robenson was the true owner. This money comes into Court on Clark's process. He has the possession, and the burden of proof is on Cruger. He has too the *legal* title, since his transfer is from the person who actually rented the property to the tenant.

We think Cruger has failed to make such a case as would make it our duty to set aside this verdict. At best the case is one of doubt; the evidence is conflicting, and a verdict of a jury must be strikingly wrong to justify its reversal.

Judgment affirmed.

JOHN NEAL, plaintiff in error, vs. GEORGE PATTEN *et al.*,
defendants in error.

Where a bill had been filed to marshal the assets of an estate, and under an interlocutory decree, the assets had been reduced to money, and were in the hands of a Receiver:

Held, That it was error in the Court to dismiss from the litigation such judgment creditors, parties to the proceeding, as held judgments founded on debts contracted before June 1, 1865, on the ground that said judgment creditors had not filed the affidavit that all legal taxes had been paid, as provided by the Act of October 13, 1870.

Relief Act of 1870. Before Judge O'NEAL. Mitchell Superior Court. June, 1871.

In a contest over money in the hand of a Receiver, the Court dismissed the bill as to Neal, a judgment creditor claiming said fund, because, while his judgment was founded upon a contract made prior to June, 1865, he had filed no affidavit as to having paid the taxes on it, as required by the Relief Act of 1870. That is assigned as error: See Neal vs. Patten, 40 Georgia Reports, 363, for the original proceeding.

LYON & DEGRAFFENREID; VASON & DAVIS, for plaintiff in error.

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WRIGHT & WARREN ; J. L. SEWARD ; A. D. HAMMOND ;
J. RUTHERFORD, for defendants.

McCAY, Judge.

The debt of the plaintiff in error was reduced to judgment before the passage of the Act of October, 1870, and he is not now seeking a judgment upon it. His suit is not pending, but has been ended by a judgment in his favor. The first section of the Act does not, therefore, apply to it. Nor is it levied, or about to be levied, so that section 5 of the Act of 1870 does not meet the case. Here is a trust fund. It is in the hands of the law. The different claimants are brought before the Court, to determine to whom it shall be paid. The plaintiff has a debt, ascertained by law. It is a judgment. There is nothing in the Act of 1870 to meet the case. He is neither seeking a judgment on his debt, nor is he pursuing the property of the defendant by levy. The Act of 1870 is careful to say nothing affecting the *debt itself*, in the cases it provides for. A pending suit is to be *dismissed* if the affidavit is not made within the time prescribed, and no levy or sale is to be had unless the same thing is done. The plaintiff in error was in neither of the situations provided for. This Court has no right or power to provide that a case not provided for shall come within the Act.

Judgment reversed.

SANKEY & SHORTER, plaintiffs in error, *vs.* THE COLUMBUS IRON WORKS, defendant in error.

SANKEY & SHORTER, plaintiff in error, *vs.* HALL, MOSES & COMPANY, defendant in error.

1. Where, on the trial of an issue of partnership or no partnership, one witness swore that the capital stock, to-wit: a steam saw mill, was furnished by one, and the hands to run it by another, who was also to superintend the work, and that the profits were to be divided equally

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between the two; and another witness swore that the mill, fixtures and hands were furnished by one, and that the other was employed by the first as superintendent only, that he had no interest jointly with the first in the profits and losses, but was to receive one-half the net profits for his services, and had only a common interest in the profits:

He'd, That under section 1880 of the Revised Code, by the testimony of the first witness there was as to third persons, a partnership, since the hands furnished a part of the capital stock, and the partners had a part interest in the result; but that by the testimony of the second witness, no copartnership, even as to third persons, arises from the simple fact that one is to receive half the profits for his services; such an one has no joint interest in the profits and losses, but only a common interest in the profits, and it is error in the Court to charge this as the law to the jury, if they should believe the second witness.

2. Whatever may be the interest of the parties, and whether they be, in fact, partners under the bargain or not, they will be liable, as such, if they so act as to hold themselves out to the world as such.
3. Partnership or no partnership is a fact, and a witness may so state, but the fact so stated may be qualified and explained by other facts in evidence, either from the witness or from other testimony.
4. Objections to interrogatories on the ground that they are leading must be made when they are presented to the objector, to be crossed, and before they are executed.
5. The sayings of one of the partners, not expressly or by implication brought to the knowledge of the other, are no evidence against that other, in an issue of partnership or no partnership.
6. In a doubtful case, where the law was not presented fairly, in view of the evidence, a new trial may be granted. (R.)

Partnership. Evidence. Interrogatories. Before Judge JOHNSON. Muscogee Superior Court. November Term, 1870.

The Columbus Iron Works sued Sankey & Shorter as partners, for goods sold and delivered. Sankey was not served. Shorter pleaded that he was never Sankey's partner, etc. The account began in January, 1867, and ended on the 7th of March, following. Plaintiff proved the account by its books only. The contest was as to the fact of partnership. Plaintiff offered as evidence interrogatories answered by Sankey. The first question was, "do you know who composed the firm of Sankey & Shorter, who had a saw mill in 1866 and 1867 in Russell county, Alabama. If

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you were one of said firm state what connection James H. Shorter had with the firm." The answer was, "I know who composed the said firm, James H. Shorter and myself. Mr. Shorter furnished the mill, and I furnished the hands and run the mill." The second question was of like character. On these interrogatories was written, before they were crossed, an objection because they were leading and asked legal conclusions. These objections were insisted upon at the trial and overruled. But it was said in argument that they were not made till the trial. Besides the foregoing answer, Sankey therein testified that the partnership between him and Shorter lasted till the 1st of March, 1867; that he invested no money in the mill, it belonged to Shorter, but he, Sankey, bought stock to run the mill. "The contract was that I should superintend the mill, and have one-half interest in the mill and all appurtenances, for which I was to pay Mr. Shorter." He further swore that during Shorter's absence, in Cuba, he, Sankey, moved the mill to another place and arranged for another to furnish lumber and take an interest in the mill. Here plaintiff closed.

Defendant's counsel then asked to continue, that he might get a witness from Alabama to impeach Sankey, saying his answers had been in but a few days, he did not know what he would swear, and had not had time to get the testimony of the absent witness. The Court refused the continuance. Shorter then testified that in the fall of 1865 he owned said mill and appurtenances, and engaged Sankey to supervise it and gave him half of the net profits for his services; that Sankey never had any authority to use such firm name, that there was no partnership, nor did he know Sankey had used it till 1867, and immediately took steps to stop it. "Sankey had no joint interest in the property, nor joint interest in the profits and losses of the business; he had a common interest in the net profits alone; he was to share none of the losses if any were sustained in the business." And he denied knowing anything of the purchase of said goods, and said it was

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after the removal of the mill, in his absence and without his knowledge. He was asked "the usage of the mill as to purchasing while he was with it," but the Court sustained an objection to this question. Defendant sought also to prove the arrangement which Sankey made with said third person when he moved the mill, but the Court would not allow him to do so.

As to the question of partnership the Court charged the jury, "if Shorter was to furnish the mill, and Sankey was to furnish the hands and supervise the running of the mill, and the net profits were to be divided between them, then Shorter was a copartner with Sankey, and as such is responsible to plaintiff. If Sankey, without the knowledge or consent of Shorter, formed a copartnership or made an arrangement with Wilkinson, such as was testified to, this would dissolve the partnership of Sankey & Shorter, and Shorter would not be liable as a partner for articles purchased by Sankey after such agreement with Wilkinson."

Defendant's counsel requested him to charge the jury: 1. "Where a party takes a common interest in profits alone for his services, he is not bound in law for any losses of the business; and if there are no profits and some debts, and the party gets no profits and is liable for no losses, there is no partnership." 2. "If Sankey and Shorter run a saw mill, and Shorter was to pay one-half the net profits to Sankey for his services alone, this does not make them partners." 3. "Participation in profits will not necessarily create a partnership in all cases as to third persons. Thus if a party has no interest whatsoever in the capital stock, and as between himself and the other parties he has also no rights as a partner, but is simply employed as an agent, and is to receive a given sum out of the profits as a compensation for his services, he will not be deemed a partner in the concern from that fact alone; nor as to third persons, because the transaction may justly be deemed a mere mode of ascertaining and paying the compensation of an agent as in a naked case of agency."

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4. "The sayings of Sankey that Shorter was a partner, in his testimony, should not be considered."

The Court refused to charge the first request. He refused the second, and charged in lieu thereof that "if Shorter furnished the mill and Sankey furnished the hands and run the mill, and the net profits were divided between them, then Shorter was a partner with Sankey, and is responsible as such to plaintiffs. He refused to charge the third request. He also refused to charge the fourth, and in lieu of it charged "that partnership or no partnership is a fact which witnesses may swear to." The jury found for plaintiff for the amount sued for.

Shorter says the Court erred in overruling said objections to Sankey's interrogatories and answers; in refusing a continuance; in not allowing Shorter to testify as to the usage of the mill; in charging as he did, and in refusing to charge as requested. So much for the first of said cases.

The second is so very similar to it that a report of it is unnecessary. They were treated as one case here.

JAMES M. RUSSELL, for plaintiff in error. As to the interrogatories: R. Code, secs. 3809, 3811, 3812. Usage competent: R. Code, secs. 3752-1. Evidence of arrangement with Wilkinson competent: R. Code, secs. 1886, 1907, 1895; Story on P., sec. 5; 15 Miss. R., 370. The verdict was contrary to law: 18 Ga. R., 703; R. Code, sec. 1880; Hansard's P. Debate, volume 178, page 1274; 180, page 121; 10 Met. R., 303; 34 Howard's R., 536; Story on P., secs. 32, 36, 38, 49, 43; 12 Conn. R., 69; 14 Pick. R., 192; 14 Louis (Mo.) R., 52; 5 Gray's R., 588; 6 Met. R., 82; Smith on M. L., 40; 6 Halstead, 181; 1 Denio, 337; 2d, 279; 3 Conn. R., 132; 5 Iowa, 721; 25 Barb. 13.

PEABODY & BRANNON, for defendants in error. The questions are not leading: 1 Gr. on Ev., sec. 434. If they were Court may allow them: *Ibid.*, sec. 435. The exceptions

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should have been filed with interrogatories ; 37th Rule of Court. Verdict was according to law : 8 Ga. R., 285 ; 14th, 705 ; 33d, 243 ; 36th, 344.

McCAy, Judge.

1. The important question in this case, the construction we are to put upon section 1880 of our Revised Code. That section is as follows: "A joint interest in the partnership property or a joint interest in the *profits and losses* of the business constitutes a partnership as to third persons. A *common* interest in profits alone does not."

Under the testimony of Sankey in these cases, he and Shorter were clearly partners, since, according to his statements, he was to furnish the hands and Shorter the mill, and the profits to be divided equally. According to this there was a joint interest in the stock, since that was made up of the mill and the hands to work it; and the case falls within the terms of the first line of the section.

But Mr. Shorter's testimony states directly the contrary of this. He furnished, as he says, the mill and the hands; Sankey was a mere superintendent, and had no interest at all in the stock. He says further, that Sankey did not have "a joint interest in the profits and losses, but only a common interest in the profits."

The language of this witness is in the express words of the statute, and, if it is to be taken literally, it comes exactly within the last sentence, which declares in terms that a common "interest in profits alone," does not make a partnership as to third persons.

It is contended, however, and, we think, rightly, that it is not for the witness to settle the rights of these parties by the particular *language* he uses. His whole testimony must be taken together, and the Court is to judge what he means, when he says that Sankey had not "a joint interest in the profits and losses, but only a common interest in the profits."

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It is clear that he means that Sankey was to have an interest in the *net profits*. Now it is contended, that as the "net profits" are only what is left after paying expenses and losses, an interest in the net profits necessarily involves an interest in the losses.

The real question, therefore, is, what is meant by the words "a common interest in profits alone," in this section of the statute? Does it mean "gross profits," or may it also include the case of "net profits?" And if so, under what circumstances? There is some confusion in the authorities on this subject, and it is hard to reconcile them. In a very fair sense, it may be said that one whose interest is in the "net profits," is also interested in the losses, since the net profits can only be what is left after paying the losses, and there are many cases to the effect that one who is thus interested is a partner. On the other hand, it is true that the words "net profits" do not necessarily cover all losses, since it may be that there are no profits, and that the concern is in debt; and it is very reasonable that one should contract that he is not to be liable for losses, meaning that if the losses exceed the profits he shall not be liable for any part of the excess, and there are cases which clearly make this distinction. There are many cases, also, to the effect that one who is employed as an agent or clerk, and to be paid for his services in a share of the profits, is not a partner, even if the profits meant be the "net profits." The ground of the decisions is that he has no interest in the profits *as a partner*, but that the profits are merely the measure of his losses. We think the Code, section 1880, uses language evidently intended to convey this idea. The language is, that a *joint* interest in the profits and losses makes a partnership, but a *common* interest in the profits does not. If the interest is the interest of an owner, if there be a joint seizure, if the person whose interest is in question, has a right, as such *owner*, to dispose of the profits, then there is a partnership, if the parties be seized *per mi et per tout*. If one may dis-

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approve of or control the profits as much as the other, then there is a joint interest. But if the party whose interest is in question have only a "common interest" in the profits with the other; that is, if he have no title jointly with the other; if his position be that of a mere employee, with no right of control as owner over the profits, but with only a common interest in them, that is, interested in common with the other, in their increase or decrease, because they measure the *amount* of his *wages*, then he is not a partner. Story on Partnership; Lee vs. Buckner, 285; *Dalton City Council vs. Dalton Manufacturing Company*, 33 Georgia, 243. *Same case affirmed*, 37 Georgia, 115.

We take it for granted that it was not intended by the Code to change the well settled rule upon this subject, to-wit: that if parties go into an adventure, one furnishing money or stock and the other skill or labor, and to share the net *profits*, they are partners, since it follows that in such a case they have a *joint interest* in the profits. It is significant that the language used is "*a joint interest* in the losses and profits constitutes a partnership as to third persons. A *common interest* in profits alone does not." The change of the word "joint," in the first sentence, into "common," in the last, indicates, as we think, the meaning to be as we have said. Now, in this case, Mr. Shorter swore that Sankey was only an *employee*, that he "engaged" him to superintend, that his interest was not that of a partner, but that he had a common interest in the profits. Now we think the Court ought to have charged the jury, pointing out this distinction, to-wit: that if Sankey's interest was only in the net profits as a measure of what Shorter was to pay him, if he had no *joint* interest with Shorter in them as their mutual *property*, then there was no partnership. Shorter's evidence would justify and require such a charge. The charge, as given, assumed that Sankey was to furnish the hands and Shorter the mill. If what Shorter says be true this was not fair to him. As he tells it, there was no furnishing in the matter. He en-

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gaged or employed Sankey. Sankey *was not* to furnish the hands. We think Shorter had a right to have the law of the case put to the jury in the light of the evidence which he presented.

2. As a matter of course, whatever be the agreement, whether there be in truth a copartnership or only a hiring with the employee, interested in the profits so far only as that their net amount is to determine what his employer shall pay him for his labor, whatever be the truth, if the owner of the property permit his employee, with his knowledge, to hold himself out to the world as a partner, he is such as to third persons. This is nothing but plain common sense and honesty. To allow the contrary doctrine would be to countenance fraud.

3. It is sometimes difficult to say what is a fact and what is a conclusion. Half of what every man tells as facts is nothing but very certain conclusions. We think partnership or no partnership, ordinarily, may be stated as a fact. Son or no son, father or no father, stand on pretty much the same footing. Ordinarily, such things are stated as facts. A witness who states them is open to cross-examination, in which the ground of the statement can be inquired into. We think it would be restricting the range of statement too much to say that a witness cannot be permitted to state, as a fact, that one man was a partner in a firm.

4. The 37th Rule of Court positively *requires* that objections to interrogatories, on the ground that they are leading, must be filed before issuing the commission: New Rules, page 16.

5. After a partnership is established, the sayings of one in reference to the business binds the others; but on the question of partnership or no partnership, to make the sayings of one bind the others they must be made under such circumstances as would charge other persons on matters in dispute. They must, by implication, at least, be *quasi admissions* of the party to be charged.

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Until the partnership is established, there is no relation between the parties that should make the sayings of one bind the other, more than there is to make any other sayings of one man to bind another. As the issue was here partnership or no partnership, the sayings of one, to bind the other, ought only to be such as would amount to *quasi* admissions of the party to be charged: that is, said under circumstances where the failure to deny them amounts to an admission.

1. We have some doubt as to our duty in this case, but upon the whole, we reverse the judgment, on the ground that the charge does not fairly present the law, in view of the evidence of Mr. Shorter.

Judgment reversed in both cases.

LEE L. JAMES, plaintiff in error, vs. EDWARD R. ELLIOTT,
defendant in error.

1. When, upon the trial of a bill filed to restrain the collection of notes given for the purchase-money of land, both cases, the common law suit and bill being filed together, it was charged that, by the misrepresentation and fraud of the vendor as to the boundary of the land, the vendee made the purchase, and by such fraud he had been misled into expenses in preparation so far as making brick, for which purpose he bought the land, and which was known to the vendor at the time of the sale, and the Court rejected the evidence offered by the complainant, the vendee, to show his damages resulting from the alleged fraud, and also as to the quality of the land:

Held, That this ruling by the Court was error. Under our law, fraud with injury gives a right of action—Code, 2906, 2907—and he may recover the damages, whatever the jury may allow in an action against him for the purchase-money, the rule of estimating damages being confined to his actual damage which he has suffered by the fraud of the party, the fact of fraud being for the jury to determine.

2. *Held again*, That it was error to rule out evidence of the deficiency of the quantity of the land. Under section 2800 of the Code apportionment of the price as well when the purchase has been by lot as per acre may be had when deception or mistake amounting to fraud is proven, which is for the jury and not the Court to determine.

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8. Under our opinion we hold that the whole case, with the evidence offered, ought to have been submitted to the jury, and let them weigh it under the legal rules governing evidence.

Misrepresentation. Fraud. Damages. Recoupment.
Before Judge HOPKINS. Fulton Superior Court. October
Term, 1870.

Elliott sued James for the unpaid part of the purchase-money of certain land which he had sold to James. James' defense was that he told Elliott that he was buying said land solely to make brick, and for that purpose wanted a strip of clay land which Elliott said was part of the lot, and so believing, he took a bond for titles to the lot, went upon it, spent over \$800 00 in hiring hands, etc., in preparing to make brick, and then found out that said strip of land was not a part of Elliott's land, and it was the only part fit for brick making, and immediately abandoned the premises, and offered to rescind the trade, but Elliott would not. All this he proved, and asked to recoup from his notes the amount so expended by him. He also offered evidence of a deficiency of land from the quantity represented. Elliott testified, denying the material parts of the defense *toto coelo*.

The Court ruled out all the evidence of the damages sustained by James in his preparation to make brick as well as evidence relating to the deficiency in the quantity of the land, and ruled that James was not entitled to any abatement or deduction from the notes in consequence of said expenditures. The jury found for Elliott for the full amount of the notes. Said rulings are assigned as error.

ROBERT BAUGH, for plaintiff in error, cited 1 McCord's R., 121 ; 3 Law Times, 61 ; 6 John R., 181 ; 2 Wend. R., 385 ; 18 John R., 403 ; 2 Head R., 445 ; 8 Allen's R., 560 ; 19 Iowa R., 162 ; Sedg. on Dam., 51, 8, 9, 559 ; R. Code, secs. 2906, 2907.

L. J. GLENN & SON, for defendant.

LOCHRANE, Chief Justice.

Upon the trial of this case, the suit at common law and the bill in equity were tried together. It appeared that Lee L. James purchased from E. R. Elliot a city lot of four acres, in the city of Atlanta, paying a part cash and giving his notes for the balance. The suit at common law was instituted by Elliot against James for the balance of the purchase-money, and James filed his bill in which he alleges that he desired to purchase the lot for the purpose of establishing a brick yard, and that Elliot knew his intention in the premises. He charges that Elliot misrepresented the boundaries of the lot, representing a ridge upon the eastern side to be the boundary, which was nearly the whole of the lot, suited for making brick; that relying upon the boundaries as represented, he purchased the lot and took a bond for titles thereto. He further charges that his sole object in making the purchase was to establish a brick yard, and that he so informed him; that after the purchase, he employed hands, put up two small houses and a stable on the lot, and made other preparations for making brick; that he had two wagons and mules, etc., and, when he commenced levelling the lot and digging up the soil, he was informed the soil did not belong to, and was not embraced in the boundaries. He charges that he immediately notified Elliot that he had been deceived, etc., and was forced to abandon, etc. He charges that he was damaged by the deception practiced on him, \$1,286 43. He prays an injunction restraining the suit; that the trade be rescinded, his notes delivered to him, and his cash payment refunded, with interest, and that he be decreed such damages as he may have sustained by the fraud practiced upon him, offering to deliver the bond to be canceled.

The defendant answered the bill, denying the charges made of the purposes of his purchase, and all fraud in the premises. Evidence was introduced on both sides, and the

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jury found for the plaintiff the amount of the notes. The Court below ruled out all the evidence of damages sustained by James in his preparations to make brick, as well as the evidence relating to the deficiency in the quantity of the land, and stated that James was not entitled to any abatement or deduction from the notes, in consequence of the expenses he had been at, or the damages he had sustained by Elliot, or the want of quantity under the evidence. Which ruling of the Court was excepted to and forms the ground of error assigned.

1. The question presented by the record is a purely legal one. Is a party entitled to set up damages by way of recoupment for fraud practiced upon him in the purchase of property? The law recognizes the right of the party to an action for damages for injury resulting to him from fraud. This right is settled by the Code, section 2906. And section 2907 declares "willful misrepresentation of a material fact made to induce another to act, and upon which he does act to his injury will give a right of action;" "fraudulent or reckless representation of a fact as true, which the party may not know to be false, if intended to deceive, is equivalent to a falsehood." Thus the right of action is declared by our law. If the party has the right of action he may recoup the damages in an action against him for the purchase-money: *Houston vs. Young*, 7 Indiana, 200, and *Lamerson vs. Marvin*, 8 Barbour, S. C. Reports, 9. And the rule of damages recoverable must be compensatory, or for actual damages sustained, and not remote, speculative or vindictive. Perhaps no doctrine is more complicated in the variety of cases found in the books than the subject of damages. We will notice one case within the analogies to this transaction. In *Reynolds vs. Cox*, 11 Indiana, 262, the measure for damages for misrepresenting the location of a mill and privileges, and land described in a deed, the vendor electing to keep what did pass, is what it would cost to get the land falsely represented to be covered by the deed." The ordinary rule of estimation is the difference between the value as it is, and as it would

be, as represented, at the time of the purchase: 43 N. H., 363; 12 Rich. law, S. C., 138. A great many cases may be found where damages may be set-off to a suit for the purchase-money. When there has been breach of warranty, but few cases where the rule of estimating unliquidated damages arising from fraud in the representation, out of which the party has been put to expense, are laid down by any standard writer. The principle we deduce from the authorities is, that when, by the fraud of a vendor, the vendee has been led into expenses, he may recover compensation in damages for the actual injury he has sustained.

2. To illustrate by the case at bar: If James had purchased this lot from Elliot, and the jury believed, from the evidence, there was no fraud in representing the boundaries of the lot to him, and the land was less than sold, in quantity, (and within the section 2600 of the Code, as to the apportionment of price,) then the jury would find, by apportionment, for the deficiency, as against the notes sued for the purchase-money. But if the jury believed that Elliot did know the purpose of the purchase was to establish a brick-yard, and misrepresented the boundary of the lot, fraudulently deceiving James as to the land sold, enhancing the part valuable for brick making, and acting upon such fraudulent representations James bought, and was put to expense in fitting up and preparing for the business, then the damage which James received by the fraud of Elliot would embrace and be measured by a different rule. And the jury ought, under such facts, if proved to them satisfactorily under the rules of law, have found for James the actual cost of the injury thus sustained by him. This question was adjudicated in New York as stated by Sedgwick on Damages, page 560. It was held that under misrepresentations as to the land being suitable for building lots, etc., the vendee could recoup the damages which he had actually sustained by the fraud. Sedgwick lays it down as impossible to fix any general rule, and we concur in the proposition so far as to erect any stand-

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ard by which the damages must be estimated. But we think the general rule may be stated that where fraud upon the part of a vendor induces the vendee to lay out labor, time and expense, of the fruits of which he is deprived, his injury is to be estimated by the amount of damage he has actually suffered. This term *actually suffered* will not embrace damages resulting from loss of profits or the like, but is confined down and limited to the direct consequences of the injury sustained. In this case the question of fraud was a fact for the jury exclusively to pass upon under the law charged by the Court. The testimony ruled out went to the extent of showing the cost and expense the defendant had been put to. We hold that the proof was admissible. If the jury found the fraud, the proof was applicable. If they did not, the jury would discard it. It was a question for them. Again, we may notice the rejection of the evidence as to the deficiency of the quantity of the land. Our Code, section 2600, declares in a sale of land, if the purchase is per acre, a deficiency may be apportioned in price, but if the sale is by the tract or an entire body, it cannot, except there be deception or mistake amounting to fraud, when it may be apportioned. In looking through this record we are satisfied that the evidence ought to have been admitted, and the law controlling it should have been given to the jury. Upon the merits of this case, upon the facts, we express no opinion. The only question before us is the rejection of evidence. Its weight or significance we do not adjudge.

The whole case, in our opinion, ought to have been submitted to the jury to let them weigh it under the legal rules governing evidence and find a verdict according to the proof and the charge of the Court upon the law.

Judgment reversed upon the ground the Court erred in rejecting the evidence offered, under the facts in this case.

JOHN D. SMITH *et al.*, plaintiffs in error, vs. P. L. TURNLEY, administrator, defendant in error.

A Justice of the Peace may issue a distress-warrant for more than he can entertain a suit for. (R.)

Where a party levied a distress-warrant on property consisting of a lot of drugs, which had been exempted by the Ordinary under the law of personalty exemption, and it appeared the drugs exempted had been mixed with other drugs bought by the parties :

Held, That the privilege of exemption extends only to the articles exempted by the Ordinary, and they must be identified to release them from levy, and a lot of drugs in a store, mixed with other drugs, are liable to levy and sale, except as to such parts or articles as may be specifically claimed and identified.

(*Held, again*, That when a party sublets to another under a contract that the sublessee is to pay the rent due, this is not such a claim for rent by the landlord as may be enforced against the sublessee by levy of a distress-warrant.

Held, again, That the verdict of the jury in this case exceeded the amount proved to be due for rent, and we direct that the plaintiff write off the excess of the verdict over the rent due for the actual occupancy, or in default thereof that a new trial be granted.

Jurisdiction of Justice of the Peace. Homestead and Exemption. Before Judge HARVEY. Floyd Superior Court. January, 1871.

Hamilton & Turnley were partners as druggists, in Rome, Georgia. In September, 1868, Turnley sold his interest in the business to Hamilton, upon certain terms specified in writing, one of which was that Hamilton would pay Turnley rent from the 1st of March, 1868, to the 1st of January, 1870, at \$50 00 per month. Subsequently, in May, 1869, Smith bought out Hamilton, and agreed, not only to pay Turnley the rent accruing, but that which Hamilton then owed Turn-
party to this agreement, and still looked
ent. The Ordinary set apart (when,
mith, as exempt from his debts, for the
children, "one stock of merchandize,
medicines, etc., specie value, \$600 00;

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one horse and buggy, specie value, \$225 00." Then Smith sold the horse and buggy, and with the proceeds bought other drugs and medicines, and put these with the exempted lot of drugs and medicines and "a large lot of other drugs and medicines." It is said that this was done in February, 1869. On the 15th of November, 1869, Smith's wife bought his interest in said stock and kept them in said store till the 29th of March, 1870.

On this last day, Turnley was advised that he could proceed against Smith and his wife severally for rent. Thereupon, he sued out a distress-warrant against Mrs. Smith for \$250 00, and another against Smith for \$1,250 00. The affidavits were made before a Justice of the Peace, and he issued the warrants. The warrants were levied upon the drugs and medicines then in the store, worth \$200 00. Smith claimed them as trustee for his wife and children, under said exemption. The cases were tried together by consent. On the trial the foregoing facts were proved.

Pending the trial, Smith's counsel objected to the warrants as void, contending that a Justice of the Peace could not issue a distress-warrant for more than \$100 00. The objection was overruled. They also objected to the contract between Hamilton and Turnley as irrelevant, but the Court overruled that objection also. The Court charged the jury as follows: "When a tenant sublets, the subtenant is the tenant of the original landlord and will be liable to him for the rent for the time he permits him to remain, in case no one else pays it; but the landlord, in such case, may agree to look to the first tenant alone, and if so, he could not go on the subtenant; and the same would be true if the premises be sublet again by the first subtenant." He was requested to charge that, if Smith "put the personalty exempt by the schedule, as drugs, in the drug store, and there are more drugs levied on than were put there," the jury should find for claimant. The Court refused so to charge, but charged as follows: "Any kind of personal property may be set aside under the Home-

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stead Act, except money, and the same cannot be levied on and sold for debt. But those who claim it as exempt must be able to show, in some way, that it is the property that was so set apart, to the satisfaction of the jury. If a stock of drugs, it would be sufficient that the whole stock had been so set apart without itemizing, provided no more has been added to the stock since it was set apart. But if the stock so set apart has been, by those who claim it, so mixed with other drugs, which were not in the exemption, as that the exempted articles cannot be ascertained and identified, the rights of creditors would not be thereby defeated from seizing the property which is liable to their debts. Let justice be done, however, to all parties as far as can be."

The jury found that \$1,250 00 was due Turnley for rent, of which Smith owed \$1,000 00 and his wife \$250 00, and that the property was subject to the warrants.

Claimant's counsel moved for a new trial upon the grounds that the said verdict was wrong, and that the Court erred in overruling said objections and charging as he did, and refusing to charge as requested. A new trial was refused, and error is assigned on each of said grounds.

WILLIAM D. ELAM, by E. N. BROYLES, for plaintiff in error.

UNDERWOOD & ROWELL, for defendant. Justice can issue distress-warrant for over \$100 00: 15 Ga. R., ...; 38th, 262. The description in schedule was too general: 40 Ga. R., 485. No sufficient identification of the goods levied on as having been bought with proceeds of exempt property: Winslow's (N. C.) R., 288; 25 U. S. Dig., 235; 21st, 247; 24th, 267.

LOCHRANE, Chief Justice.

The record in this case discloses a confusion of facts out of which it has been difficult to ascertain the merits. It

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appears that Turnley, as administrator of B. H. Lampkin, deceased, made out two affidavits for rent against the plaintiffs in error, upon which distress-warrants issued, and were levied upon a stock of drugs. The property levied upon was claimed by Amelia Smith and J. D. Smith, under the homestead and exemption laws, and the affidavit of J. D. Smith alleges that certain personal property was set apart by the Ordinary of Clay county, among which was one stock of merchandise consisting of drugs and medicines, amounting to \$600 00. And all the property claimed was purchased with the proceeds of the property set apart. The two warrants levied were one for \$250 00 for rent due by Mrs. Amelia Smith, and one for \$1,250 00 for rent due by John D. Smith. The affidavits upon which these warrants are predicated fail to set out for what time or term the amounts claimed are due. It was agreed upon the trial to submit both cases together, and upon the proof the jury found for the plaintiff, and that the property was subject, when counsel for the Smiths moved for a new trial growing out of alleged errors committed by the Court.

By the evidence, it appears that Turnley and one Hamilton, on the 28th of September, 1868, entered into a written agreement, by which Hamilton bought from Turnley his stock of medicine, etc., and agreed to pay him, as administrator of Lampkin, the rent due, and falling due up to the 1st January, 1870, at \$50 00 per month. When J. D. Smith bought out Hamilton, Turnley swears that he promised to pay the rent due by Hamilton upon this contract. The purchase by Smith from Hamilton was in May, 1869, and he was to pay \$1,700 00, which Smith swears included the rent due up to the expiration of Hamilton's lease or 1st January, 1870. The testimony conflicts upon this question of liability and promise to pay the rent due by Hamilton upon the part of J. D. Smith, and the certified copy of the personalty exemption were also in evidence. We have extracted these facts out of the bill of exceptions, and proceed to dispose of the legal questions made.

1. The right of a Justice of the Peace to issue a distress-warrant for an amount beyond his ordinary civil jurisdiction, is clear and unquestionable, and when levied by the proper officer and returned to the proper Court, the warrant is legally binding upon all parties. And it was not error in the Court below to so hold in this case.

2. It was not error in the Court to admit the written evidence or agreement, though entered into between Turnley and Hamilton. It was a lease for the premises in dispute, covering a part of the term they were occupied by Smith. Though *res inter alios*, yet, when Smith came into possession as a sub-tenant, it was some evidence to show the amount of rent due by the tenant, and was the foundation for laying the ground of liability against Smith for his occupancy, so far as that fact was involved in the issue. Again, the sub-tenant is the tenant of the landlord for the time he actually occupies the premises; the relation of landlord and tenant exists and may arise out of sub-letting the premises for the time the landlord permits the sub-tenant to remain. But the agreement by the sub-tenant to pay rent due before he entered upon the premises, does not constitute a *debt for rent* as against him that will authorize a distress to levy and summarily enforce the collection by the landlord. This is practically an important question, and in the case of *Scruggs vs. Gibson et al.*, 40 Georgia, 519, this Court has laid down the principle, that to authorize a levy by distress-warrant for rent, "the relation of landlord and tenant must have existed during the period for which the rent is claimed." How far the agreement of A with B, to pay the rent due by B at the time of the agreement, may be enforced as a debt for rent due, by the landlord, by distress upon the property of A, is a question I have been unable to meet decided either way by our Courts, and I follow only the justice and judgment I entertain of the provisions of our Code upon the subject. In other States I find the principle recognized that the assignees of a lease or sub-tenant are liable upon their pos-

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session, and not for back rents due to the landlord. And distress-warrants, in the case at bar, we hold, could not be issued and levied for rent due by Hamilton upon the proof of a promise to pay by Smith, his sub-tenant, such rent to him.

3. In the matter of error alleged in relation to the charge of the Court upon the subject of "exemption" we think the Court charged the law correctly. To assert the protection of the law in cases of personalty exemption, there must be a distinct identification of the property exempt. To exempt a stock of drugs and then mix such articles with others of a like kind, and, in the confusion, lose all identity of the articles exempt, is not the intention of the law. It would be manifestly unjust to so hold, and such property is liable to levy and sale. And the articles exempted must be specifically claimed and identified to invoke the protection of exemption by the Ordinary.

4. Upon the whole evidence and facts in this case, we find that the parties, plaintiffs in error, occupied the premises from the 28th May, 1869, until the 29th March, 1870, which at the price, \$50 00 per month, amounts to \$500 00, of which time Mr. Smith occupied some five months, or \$250 00, and we direct that the plaintiff write off from the verdict in this case, the amount in excess of the sum due for the rent during the actual occupancy of the parties, or in default, that a new trial be granted.

JOHN DOE, *ex-dem.* WILLINGHAM *et al.* vs. RICHARD ROE, casual ejector, and J. S. NOYES, tenant in possession.

1. When a deed had been submitted to a jury conveying lot number one, in the village of Cedartown, and a fraction west of said lot, and it was proven that there were two fractions belonging to the grantor, one small and immediately west, of a triangular shape, lying between lot number one and a public road, and one nearly equal in size, also west, but on the other side of the road :

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Held, That it was not error in the Court to charge the jury, in effect, that *prima facie* the smallest fraction, and the one immediately west, was intended.

2. The verdict in this case is supported by the evidence, and the Court below having refused a new trial, this Court will not reverse the judgment.

Ejectment. Presumptions. Charge of Court. Before Judge HARVEY. Polk Superior Court. February Term, 1871.

The Rome road runs through Cedartown, nearly from north to south. On the east side of it is lot number one, containing a half acre, which is bounded partly on the west by a small fractional lot, separating it from the road. On the opposite side of the road is another fractional lot, much larger than the first, extending much longer than number one, and having on its other sides Van Wert road and a street laid off but not opened. Ejectment was brought upon the demises of Featherston, Watts and Willingham, against Noyes, who was in possession, for this large fraction. Plaintiff's deeds conveyed number one, in said town, "containing one half acre, more or less, and *fraction lying west of said half acre*," without further description.

Watts, who bought the land from Willingham, testified that the fraction meant by the deed was the large fraction, and undertook to show possession by statute of limitations. On the contrary, the party who sold the land to Willingham testified that the small fraction *immediately* west of number one, was that conveyed by the deed. There was evidence to rebut plaintiff's possession. Each party adduced facts to

of the deed.

the Court charged the jury, "if lying west of number one, the one and the other separated from it by the presumption of law is, that the meant by the language of the deeds,

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and it requires proof to the contrary to rebut that *prima facie* presumption. If, in a deed, a fraction is conveyed, such as lying west of a certain lot without more, and there are two fractions, one small one adjoining the main lot on the west, and one large fraction, as large as the whole lot, not adjoining the lot, but lying further off, the presumption of law is that such loose, general description was not intended to convey a large and important piece of land, but applies to the small fraction and not to the large one. It may, however, be overcome by proof in such a case as this."

The jury found for the defendant. Plaintiff moved for a new trial, upon the grounds that the verdict was contrary to the evidence and certain other charges of the Court, and that said charge was wrong. The Court refused a new trial, and error is assigned on said grounds.

THOMPSON & TURNER; WRIGHT & FEATHERSTON; E. N. BROYLES, for plaintiff in error.

H. BLANCE; UNDERWOOD & ROWELL, for defendant.

McCAY, Judge.

1. We see no error in the judgment of the Court below in refusing a new trial. That part of the charge which declares the presumption to be that the land west of No. 1 means that immediately west is, in truth, nothing but a construction by the Court of the deed. That part of the charge which declares that, if there be two pieces of ground west, one very small and one of a size approaching the body mentioned in the deed, the law presumes the smaller one to be intended, is not exactly a rule of law, but it is a rule of common sense, and we see nothing so out of the way in it as to require a new trial for that reason only.

2. Nor do we think the verdict contrary to the evidence. It is very clear that Willingham knew exactly how these lots and fractions stood. He had bought No. 1 and the

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fraction soon after the survey, and when he made the bond he probably had his deed from the proprietors before him. It would, in fact, be a very strange and unusual proceeding to convey the fraction on the other side of the road by saying it was a fraction west of No. 1, especially if we remember that it was nearly, if not quite, as large as No. 1. In a town where the lots are laid off in small parcels, with streets and alleys, such a description of a lot on the other side of a street would be *very strange*; so strange that, to satisfy our minds that such was the intention, far stronger evidence is necessary than appears here. So far from thinking the verdict contrary to the evidence, we agree with the jury that the case is with the defendant.

Judgment affirmed.

M. KOHN, plaintiff in error, vs. G. B. LOVETT, defendant in error.

Where A, who was the owner of a storehouse and lot in the city of Rome, left, at the rear of such storehouse, an excavation walled up for the purpose of giving light to the cellar of such storehouse, and B, who, on an alarm of fire, went down to the storehouse adjoining the house in which the fire was, and entering at the front door went through the store, and going through the back door turned off the gangway, across the opening, and fell in and was injured:

Held, That the digging of an open space in the rear of the storehouse by A upon his own ground was a lawful act by him, and he had the right to keep it there as an appurtenant right for the use of his property, and B falling in by accident, the same not being near to a public street or crossing, gave no right to recover damages from A as a wrongdoer in the premises, and B going there on account of the fire did not change the rule.

When the charge of the Court and refusal to charge, misconceived the law of the case, and the Court refused a new trial:

Held, That this was error.

Nuisance. Highways. Negligence. Before Judge KIRBY.
Floyd Superior Court. July, 1870.

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Broad street and Green street, Rome Georgia, are parallel, and about one hundred and fifty or two hundred feet apart. Kohn owned a store fronting on Broad street and running back from seventy-five feet to one hundred feet. At its rear was an excavation, about ten feet deep and about the same width. It was made to light the cellar, and had been there many years, unguarded. It was covered only by a plank walk, as wide as the back door. For over a year the house and cellar had been in the possession of Kohn's tenant, who had frequently told Kohn said place was dangerous. But no one fell into it till Lovett fell in one night, as he was rushing through the store to a fire on premises in the rear. Lovett was severely injured by the fall, and sued Kohn for damages. The Court was requested to give certain charges to the jury, but refused. These and what he did charge appear in the motion for a new trial. Lovett obtained a verdict for \$2,000 00. Kohn moved for a new trial upon the following grounds :

1st. Because said verdict is contrary to the evidence.

2d. Because said verdict is strongly and decidedly against the weight of evidence.

3d. Because said verdict is contrary to law, and contrary to the law governing the evidence in said *cause*.

4th. Because the verdict of the jury and damages given by the jury to plaintiff are excessive, and not justified by the evidence and law applicable to the *cause*.

5th. Because the Court erred in refusing to give the jury the following charges, having been requested to do so in writing :

“1st. That if the plaintiff, Lovett, excited by being suddenly aroused from sleep by alarm of fire, ran into a house seventy-five or eighty feet long, occupied at the time; rushed to the back part of it, and finding back door closed, turned and went back to front again, and again turned, on another alarm, went back and found the back door open; and, under excitement, passed out on to a platform over an excavation

immediately in rear of the house, and seventy-five or eighty feet from either highway, and obliqued to the left, and fell into the excavation, the premises being then, and having been for many months occupied by other parties than defendant, the defendant is not liable for any damage plaintiff may have received.

2d. If said premises had been occupied for more than thirteen months by other parties, who had sub-let the property, said parties were the temporary owners or purchasers of said property, and if anybody was liable, it was said parties, and not the defendant.

6th. Because the Court erred in not giving the following charges as requested, (the same being in writing,) without qualification or addition thereto, to-wit:

1st. "Where an excavation is made near to, but not substantially adjoining a public highway, at common law no action lies against the owner of the land by a person who has strolled off the highway and fallen into such excavation." (Section 4, Hurls and Norman, page 67.) The Court added, "I give you this as the law, gentlemen of the jury, with these qualifications: that if the plaintiff was on the premises for the purpose of aiding in stopping a conflagration, and fell into a pit or excavation left unguarded, the defendant is liable, and you must find for the plaintiff, if the proof is that plaintiff was damaged." And farther, "I charge you that the streets of an incorporated city are different from an ordinary highway, as everybody is obliged to pass along them."

"2d. The occupant of land is under no obligation to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous under ordinary circumstances to persons passing upon the way, and using ordinary care to keep upon the proper path. When the excavation is at a considerable distance from the proper path or street, the owner or occupant is not liable to a stranger falling therein, whether consciously

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or unconsciously off the path." The Court said : " I charge you, gentlemen, that this is the law with the qualifications in the last preceding charge."

7th. Because the Court erred in giving the following charges to the jury, at the request, in writing, of the plaintiff's counsel:

1st. " That a party cannot permit an excavation to remain unguarded on land which he has expressly or impliedly thrown open to the public, or which abuts on a public highway, without being answerable for the consequences," defendant's counsel insisting that there was no evidence to show that defendant had ever expressly or impliedly thrown open the interior, or any portion of his lot to the public, or that the excavation or pit, into which plaintiff fell, abuts on a public highway, but to the contrary, that said excavation was about the centre of the lot, immediately in rear of the store house, seventy-five or eighty feet from either public highway, and has been there, in its present condition for more than twelve years.

2d. " That if Lovett was on the premises of Morris Kohn, the defendant, for the purpose of saving the house from burning, or aiding in stopping a fire in an adjoining house in the city of Rome, he, Lovett, was not an intruder or trespasser."

3d. " That if the plaintiff, being on the premises, on lawful business, in the course of fulfilling his duty, in which the owner has an interest, without negligence on his part, falls into a pit, left open and unguarded by the owner, the owner is liable."

4th. " That if the jury believe, under the law and evidence, that the plaintiff is entitled to recover, and is without fault himself, he is entitled to recover such damages as will compensate him for the injury received, and his sufferings mental and physical;" defendant's counsel insisting, that there was no proof as to the amount of damage, if any, received by plaintiff, or of the value of his employment, or of his sufferings, physical or mental, and no opinion given by

any witness as to their value, or as to the amount of damage he is entitled to, if any."

5th. "If the plaintiff, on a dark night, while passing the vicinity of the excavation or pit, for necessary or lawful purposes, and there being no fence or barrier across it, fell into it, and was injured; the defendant, if he is owner, is liable."

8th. Because the Court erred in giving the following charge:

"The law of this case is, that the defendant may have been guilty of negligence without any liability to plaintiff, if the plaintiff was not exercising ordinary diligence when he received the injuries. To render the defendant liable for injuries to persons in cases like this, he, the defendant, must have been guilty of negligence, and the plaintiff must have exercised ordinary diligence and caution. If the plaintiff was a trespasser upon the premises of defendant, or if he was not a trespasser and did not use ordinary diligence, the defendant is not liable. If he had the right to go upon the premises and received any injuries by the neglect of the defendant, he is liable to the plaintiff for whatever you may find to be the value of the injuries done him. If, in an incorporated city, upon the alarm of fire, a person enter upon the premises of another, for the purpose of extinguishing it, and is injured by falling into an excavation left unguarded or unfenced, by the negligence of the defendant, he is liable." (See this case 43 Georgia Reports, 179.)

DUNLAP SCOTT, for plaintiff in error, on the main question, said Kohn used his property lawfully and not negligently: Cro. James, 158; 17 John R., 100; 1 Pick. R., 418; Comyn's Dig., Nuisance (c); 1 Roll. Abr., 88. The Court should have charged as requested, without qualification: 4 Hurls. & Norm., 67; Sherman & Redfield, sec. 505; 10 Metcalf, 371; 12 Mass. R., 222. As to negligent use of one's property, see authorities just cited. Lovett was negligent: 2 Gr. R., 310; 32 Maine R., 574, 46, 536; 8 Mich. R., 388. The tenant, and not owner, is liable: 4 Term R., 318;

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27 Penn. R., 183 ; Taylor's L. & T., 109 ; 14 Ga. R., 259, 266.

UNDERWOOD & ROWELL, for defendant in error, as to Kohn's liability, cited R. Code, sec. 2902 ; Sherm. & Red. on Neg., 571 ; 4 Best & Sm. Enc. L. R., 149 ; Exodus, 21st ch., 33, 34 ; 26 U. S. Dig., 385 ; 38 Ga. R., 346 ; 39th, 729 ; 22 U. S. Dig., 421 ; 16 Ind. R., 314. What is public nuisance is for the jury : 1 Burr R., 337 ; 4 Esp. R., 200 ; 1 Strange, 586 ; Bouv.'s L. Dic., "Nuisance;" 7 Ga. R., 296 ; 28th, 399. Distance from highway not material : 30 Conn. R., 535 ; 1 Am. L. Cases, 651 ; 9 C. & B., 392 ; 23 Penn. R., 209. Both owner and lessee are liable : Sherm. & Red. on Neg., 560, 565, secs. 502, 361 ; Taylor's L. & Tenant, 124, sec. 175, note 2. Negligence is fact for jury to find : 19 Conn. R., 566 ; 5 Moore's P. C. Cases, 110 ; 32 Barb. (N. Y.) R., 81 ; 13 Ga. R., 370.

LOCHRANE, Chief Justice.

This was an action brought by Lovett, to recover damages from Kohn. The jury found for the plaintiff \$2,000 00, and the Court overruled a motion made for a new trial upon several grounds in the case.

It appears that Kohn was the owner of a storehouse in the city of Rome, that in the rear of the house there was an excavation dug out to give light to the cellar, some six or seven feet wide, ten feet deep, and running back across the whole width of the house. Lovett, being aroused by an alarm of fire, went down to it in the house adjoining the store of Kohn, and going through Kohn's store from the front, he went out of the back door, and, turning off some plank, fell into the excavation and was personally injured. This excavation was some seventy-five or one hundred feet from the street or highway. Was Kohn liable to Lovett for damages under the facts? For this question settles the balance of the questions presented by the record. We have ex-

amined the various authorities upon the subject of damages, and recognize the learned labor expended upon the question in the brief of the defendant in error. But in the view we take of this case, it is compressed into a short compass; the principle of law that controls it is plain and easily understood. And we premise by saying, if the act is actionable, the right of suit lies against the owner of the property, and not the lessee or tenant. For the tenant's liability arises out of some fault or neglect of his, and not for the original defect existing at the time of his lease.

The naked question of this case is, had Kohn the right to dig in rear of his store an excavation to give light into his cellar? If he did, and the act was the exercise of a lawful right, he is not liable for damages. If he did not have the right, and it was an illegal exercise of his dominion over his own property, he is liable. Whether he did or did not have the right depends upon other circumstances. In the first place, a man has no right to dig a pit on his own land so near a public highway that a passer-by may be injured; he may not use his own property so as to injure, or cause, by his negligence, injury to others. These principles are settled. Does a cellar light off a street and not near to a highway come within the principle? Kohn would be liable if the act was not lawful, and he would be still liable if the act was done with negligence, so that passers-by might be injured. After consideration of the authorities, we are of opinion that Kohn had the right to dig this opening in the rear of his store, and that its being off the street some one hundred feet, and not near to any pass-way, where it would have been dangerous, under ordinary circumstances, to persons passing, he was not guilty of actionable negligence in the premises. And the fact that Lovett went down to aid in extinguishing a fire does not affect the question. He went through the store from the front door, and unfortunately fell into the opening. But the right of the owner of land cannot be abridged by accidents which may happen. A man may dig upon his own

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soil away from a highway, and his right is not subject to abridgment by parties happening to go out of their way into his farm and falling into it. And the great right which every man has to be protected in life and limb, and which makes every one who, culpably, by his negligence, deprives him of these blessings, liable to make compensation in damages, does not enhance and is not infringed by the absolute rights which every man, upon his own land, has to make such improvements as he may please to have, provided they are not near a highway or place where parties passing by may, with ordinary care, get out of the way and be injured. Under the facts here in the case at bar, we think that he placed the opening, walled up, behind his store, for useful and legitimate purposes. He had a right to do what he did, and Lovett, going down there in the manner he did, and running through the store, has no right of action. This opening occupied the same condition legally that a trap door open to his cellar would, into which, if going through, he fell, and in regard to which it would be *damnum absque injuria*.

And we therefore hold the Court erred in his charges to the jury, and in refusing a new trial, and we reverse the judgment upon that ground.

NANCY BYRD *et al.*, plaintiffs in error, vs. JOHN P. BYRD, defendant in error.

A died leaving a will providing that each of his children on coming of age should receive two negroes, at a valuation, and the balance of the estate remain together for the support of the others until the youngest came of age, when the whole should be equally divided, each accounting for the negroes received, according to their value. And one of the children came of age in 1861, and received his two negroes and receipted for them at the value of \$1,100 00, and after the war, and the emancipation of the slaves, all the legatees met and divided

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the lands equally, not charging the negroes received in 1861 against the legatees who received them, and making mutual deeds to each other of the lands falling to each, all being of full age, and aware of the receipt of the negroes as stated :

Held, That in the absence of any charge of fraud or mistake or ignorance or of any other reservation or agreement, a bill is demurrable which prays a cancellation of the deeds to the legatee receiving the negroes, and seeks that he be compelled to account to the other legatees for their estimated value. The deeds are, *prima facie*, an accord and satisfaction, and if made without fraud or mistake are binding as an executed settlement and division of the property bequeathed by the will.

Wills. Conveyancing. Pleading. Before Judge HARVEY. Chambers. Floyd county. May, 1871.

This bill by Nancy A. Byrd and Thomas M. Byrd against John P. Byrd, contained the following averments: They are all heirs of John G. Byrd and distributees of his estate. He died testate, leaving \$7,500 00 of property, consisting of land, slaves, etc. His wife was made his executrix, and the will directed the property to be kept together for a term stated and then divided equally between herself and the six children, except that certain of them were to receive certain slaves at a valuation, and account for them in the final distribution. In May, 1861, John P. received from the executrix property valued at \$1,100 00, according to the provisions of the will. The results of the war so changed the value and character of the estate that it is impossible now so to divide it that complainants can get \$1,100 00 as their shares. In November, 1868, the land belonging to the estate was divided by deeds among the heirs, and John P. received in said division the east half of land lot number one hundred and fourteen, in the fourteenth district and second section of said county, containing eighty acres, and also thirty-two acres of number one hundred and thirty-nine of the same section, worth \$1,500 00. The deeds made and executed by the heirs, distributees and legatees of the estate are void, and were delivered without consideration ; for the land belonged to said estate and should

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have been made to pay complainants as much as would make them equal to John P. And this land still belongs to the estate. They specifically set forth how much money it would require to make this equality, and prayed that said deeds be canceled and the land sold for distribution.

This bill was demurred to as insufficient in law, and the Chancellor dismissed it. That is assigned as error.

UNDERWOOD & ROWELL, for plaintiffs in error.

WRIGHT & FEATHERSTON; ROBERT FOUCHE, for defendant.

McCAY, Judge.

This bill admits that the defendant holds the deeds it seeks to have delivered up to be canceled, by their *own act*. It does not charge that they were made under a mistake, or procured by any fraud, or that either of the signers were under any disability. They do not even assert that they were made in ignorance of any legal rights in the grantees. It is true the bill does charge that they were made without consideration, and adds that they are therefore void. But we do not agree with the conclusion thus arrived at. A deed to lands, fully executed, is not void for want of a valuable consideration. If there be a good consideration it is valid: Code, section 2648. And if the property be delivered in pursuance of the deed it is good without any consideration at all, as a gift: Code, section 2615. This bill does not set forth the deeds, and we are unable to say whether they purport to be for a valuable consideration or a good consideration, or whether they are based upon the mutual deeds made by all parties at the division. Nor does the bill say, in terms, that possession went in accordance with the deeds. But it is the duty of a complainant to state his own case, and the Court will not infer facts to help him. The bill says the defendant *received* these lands in the division, and the in-

ference is irresistible that he took possession, unless it be stated to the contrary.

Why, then, should this solemn act of the parties be set aside? Was it done under a mistake? Was there any deception? Was it supposed, at the time, that there was other property, out of which the equality, so insisted upon, could be effected? Nothing of this kind is stated. We suspect the truth to be, that the parties have simply *changed their minds*; that when their lands came to be divided, all parties felt that the equality, the testator provided for, could be best secured by paying no attention to negro property, which this defendant had got in 1861. It had probably met with the same fate, as did the negroes which remained undistributed in the hands of the executrix. If this was the truth, it was eminently proper, as a matter of honest equity and brotherly fairness, that they should not be counted. And if they had been sold by him, and the other legatees, with a knowledge that he had received them without mistake, or fraud, or ignorance, consented that he should come in to a full share of the lands, and that consent has been carried into execution, we see no way to help them on their subsequent repentance. The bill seems to take special care not to set forth the whole of the case. It uses only general terms, and were it not that the bill is made an exhibit, we would not even know that this \$1,100 00 was received by defendant in negroes, as provided by the will. The bill says that since the division of the land there is nothing left. But did not the complainants know that? If they did not, and acted under a mistake, it ought to have been so stated in the bill. The fact that these lands were divided by the parties, and mutual deeds made, instead of having a division made under the law itself, indicates that they had all abandoned the idea of carrying out the letter of the will. As we have hinted, we suspect this bill to be an after-thought, and to be based on a disposition to take back an arrangement, fully executed and entered into freely, without fraud or mistake. We do not

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think this can be done. It is an accord and satisfaction, fully executed, and cannot be taken back without some other reason than mere dissatisfaction.

Judgment affirmed.

CARBHART & BROTHER, plaintiffs in error, vs. M. E. PARAMORE, defendant in error.

The plaintiffs in the suit having resided out of the State at the making of the contract, and continuously since, there were no legal taxes due this State upon the same, and the affidavit was unnecessary that all legal taxes had been paid.

Relief Act of 1870. Before Judge HARVEY. Floyd Superior Court. May Term, 1871.

Carhart & Brother sued Paramore upon his note, made in 1861. It was admitted that plaintiffs, at the making of the note, and ever since, had been citizens of New York, and defendant a citizen of Georgia. Plaintiffs kept actual possession of the note till 1869, when they sent to their attorneys in Georgia. Because plaintiffs had filed no affidavit of the payment of taxes on said claim, the Court dismissed the suit. That is assigned as error.

ALEXANDER & WRIGHT, for plaintiffs in error.

SMITH & BRANHAM, for defendant.

McCAY, Judge.

This case stands upon the same ground as the case of *Collins vs. Miller*, from the Pataula Circuit, decided at this term, and is controlled by it.

Judgment reversed.

Taylor vs. The State of Georgia.

REUBEN TAYLOR, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where an indictment charged the prisoner with simple larceny of a chestnut sorrel horse, of the value of \$100 00, etc., and the Court overruled a motion for acquittal, etc. upon the ground that the indictment did not describe the property stolen:

Held, That this was not error; when the proof showed that the animal stolen was a horse, the allegation to that effect is sufficiently distinct and definite under the Code, as to the nature, character and sex of the animal, and the allegation that he was a chestnut sorrel horse, was such a mark of identity as came within the requirements of the statute.

2. An indictment against a negro need not describe him as a colored person. (R.)

3. *Held, again*, That upon a trial for larceny of a horse, a bill of sale to the horse offered by the prisoner, without showing *aliunde* its *bona fide* execution was inadmissible as evidence, and the Court committed no error in ruling out the testimony.

Criminal law. Pleading. Before Judge HARVEY. Floyd Superior Court. May Term, 1871.

Taylor, a negro, was indicted for horse-stealing. The only description in the indictment of the animal stolen was, "one chestnut-sorrel horse, of the value of \$100 00, of the goods and chattels of Albert Berrien." The indictment did not mention Taylor's color. The taking was abundantly proven. The evidence described the animal only as the indictment did. Taylor then stated to counsel appointed to defend him that he had "a receipt for the horse," and produced what purported to be a bill of sale by one Sage conveying the horse to him. His counsel stated that he had just learned this, and making Taylor produce the paper, he offered it in evidence, though he could not prove its execution.

Taylor was convicted. His counsel moved in arrest of judgment, because said animal was not sufficiently described in the indictment, and because it did not mention Taylor's color. This motion was overruled. He then moved for a new trial, because the Court rejected said bill of sale. The new trial was refused.

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D. ELAM, for plaintiff in error.

C. D. FORSYTH, Solicitor General, by J. W. H. UNDERWOOD, for the State.

LOCHRANE, Chief Justice.

1. The legal question in this case turns on the construction of the provision of the Code, section 4328. That section declares "horse-stealing shall be denominated simple larceny, and the term horse shall include male and ass, and each animal of both sexes, and without regard to the alterations which may be made by artificial means." Under this law, the plaintiff in error was indicted, and the charge in the indictment was in these words: "with the offense of simple larceny; for that the said Reuben Taylor, in the county aforesaid, on the 2d day of March, 1871, one chestnut-sorrel horse, of the value of \$100 00, of the goods and chattels of one Albert Berrien, then and there being," etc., etc. Did this indictment contain a sufficient description of the offense? We think so. The term *horse* embraces generally all the classes and sexes, and if, in fact, a *mare* had been stolen the indictment would have been defective, for the term *horse*, by section 4229 of the Code, would be insufficient. "The indictment must designate the nature, character and sex of the animal, and give some other description by which its identity shall be ascertained." In this case, a *horse* was stolen, and the term itself expressed the nature, character and sex. No man could define a *horse* more accurately or intelligently than simply by the name. And the other description, chestnut-sorrel, was a mark of identity sufficient to comply with the requirements of the statute. And we, therefore, without going into questions made upon this subject, hold that the indictment was sufficient.

2. It is not necessary in an indictment to aver the *color* of the accused, except in cases, as of intermarriage in violation

of law, when the fact enters into the ingredients of the offense. The color of the accused neither aggravates nor ameliorates horse-stealing. The crime consists in the violation of the law, and the indictment, except for identity, need not contain any allegation of the color of the thief.

3. Again, we hold in this case, that the Court did not commit error in ruling out the bill of sale tendered in evidence, under the facts. When a prisoner is upon trial for larceny, and tenders, without proof of its execution, a paper purporting to be a bill of sale for the property stolen, such proof is clearly inadmissible. This would be permitting parties to manufacture evidence of their innocence. And besides this pretext has not infrequently been used to vindicate assumed innocence. The criminal laws have been administered with great liberality of construction, preferring rather for the guilty to escape than for the innocent to suffer. This has arisen out of a disturbed civil condition; but the clouds that were thick over us are dispersing, and the return to law and order daily becomes clearer and more imperative. And men of all colors must return to habits of industry and labor. Stealing to live, which has been a trade since the war, has to cease. Men must feel some security for their stock to raise them, and all the flimsy pretexts of innocence must give way before the demand for honesty and fair dealing, and strolling and vagabondising, stealing and plundering honest men must come to an end. The Courts will enforce the laws against idleness and strolling about without homes, preying upon plantations and smoke-houses, and force into labor or into public service the vagrants who plan and execute the petty thieving of the country. We think our brother below was
vidence, and, under the law and facts
judgment.

Donkle vs. Kohn.

MARIA DONKLE, plaintiff in error vs. **MORRIS KOHN**, defendant in error.

1. Where, during the term at which a case was tried, a consent order was taken giving the losing party thirty days after the final adjournment of Court within which to make a motion for a new trial and file the brief of testimony, which time was subsequently, by another order, passed by the Judge, also by consent, extended to the day of December, and the parties failed to agree to the testimony until the last day of December, and the Judge being then absent from home, the brief, though presented to him, was not approved on that day by him:

Held, That it was not error in the Judge, on being satisfied that the delay was not the fault of the movant, subsequently to approve the brief of testimony and permit it to be filed, and grant the rule nisi to be heard at the next term of the Court.

2. Where, in the crosses to a set of interrogatories, a witness was asked as to his course during the late war, and whether he had not hired a substitute in the Confederate army, and was further asked whether he believed Jesus Christ to be the Saviour of the world, and the witness refused to answer the questions:

Held, That, as there is nothing in the record to show that such questions were pertinent to any matter before the Court, it was error in the Judge to rule out the whole of the witness' answers on the ground that the cross-questions were not answered.

3. When land is sold under a mortgage *fi. fa.* the sheriff cannot put the purchaser in possession by ousting one who is neither the defendant, his tenant, or assignee, or heir, and who holds adversely to the mortgage.

4. A tenant cannot attorn to one who claims adversely to his landlord even to prevent an illegal eviction by the sheriff.

New trial. Landlord and tenant. Before Judge HARVEY. Floyd Superior Court. May, 1871.

This was a proceeding by Kohn against Miss Donkle as his tenant, begun in May, 1870. She denied that she held under him. Plaintiff read in evidence two rent notes by Miss Donkle to Kohn, one made the 15th of January, 1868, and the other on the 15th of April, 1870, and a writing of this last date, by which she acknowledged herself Kohn's tenant of the premises in dispute. On the first note were

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receipts for rent made by Printup & Fouche, as Kohn's attorneys. Here plaintiff closed.

Defendant introduced a mortgage of the premises from one McKenzie to Horton & Pikeman, made in February, 1853; a *fi. fa.* based upon it, issued in December, 1867, levied upon the premises, and a deed from the sheriff to Daniel S. Printup, for the premises, under a sheriff's sale under said *fi. fa.*, made in March, 1868. She also put in evidence a conveyance of the premises by D. S. Printup to John Printup, his son, made in May, 1868. The expressed consideration of the sheriff's deed to Printup was \$30 00, and of his to his son, \$10 00 and natural affection.

D. S. Printup testified that McKenzie was in possession of the premises under bond for titles from Shorter, when he mortgaged them, that the mortgage was foreclosed and the premises were about to be sold. One Myers had the sale enjoined, because he had bought the property at a sheriff's sale, under a *fi. fa.* in favor of Shorter against McKenzie for the purchase-money. This cause went to the Supreme Court. See 25 Georgia Reports, 89. That Court sustained the injunction, but directed the bill to be amended. Nothing was done with the cause till 1867, when Myers' counsel not objecting, Printup took an order in open Court dismissing Myers' bill, and subsequently ordered said sale to proceed. He swore that he gave Kohn notice in January, 1868, that the sheriff was going to sell the premises under said mortgage *fi. fa.*; that he would have bid \$500 00 or \$600 00, for the property, as the *fi. fa.* was that large, and no other property was subject to it. (The property rented for \$15 00 per month.) Further, he said that when the sheriff went to put him in possession of the premises Miss Donkle attorned to him to avoid eviction, upon his agreeing to save her harmless.

Miss Donkle testified that she rented the premises from Kohn, and held under him till she attorned to Printup, when and for the reason aforesaid, she afterwards attorned to Kohn

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again, to avoid litigation with him. She also said that in the Summer of 1868 she saw Kohn in Philadelphia, who said she could pay the rent to Printup, and that he did not blame her under the circumstances.

In rebuttal it was shown that in 1863 the property was sold under a *fi. fa.* against Myers, subject to vendor's lien, which was subsequently paid, and the purchaser at that sale sold it to Kohn and put him in possession, and Kohn ever since held possession by his tenants, as aforesaid. The record of the case in 25 Georgia Reports, 89, was put in evidence.

Kohn's counsel offered in evidence Kohn's interrogatories. In them he denied consenting that Miss Donkle should pay Printup rent, and said that Printup only told him there was an old, trifling claim on the land, which he, Printup, who was then his attorney, would see did no damage.

The cross-interrogatories asked Kohn if, since the war, he had not sworn that he had ever been loyal to the United States, and collected a claim against the United States, and yet, during the war, did aid the Confederate States in various specified ways, he then living South; and if he believed in the divinity of Jesus Christ. He refused to answer any of these questions, saying they had nothing to do with the case. Because these questions were not answered, the Court would not allow his testimony to be read. The other evidence was *pro* and *con.*, attacking Printup's conduct and supporting it, but it is not material here.

Kohn's counsel requested the Court to charge the jury substantially, that if Miss Donkle held under Kohn, she could not avoid paying rent to him by attorning to Printup; that if Kohn had held the property adversely to said mortgage for four years before the sale, under it the sale was void; that a sheriff could remove no one from possession of land sold by him at sheriff's sale, except the defendant in *fi. fa.*, or persons holding under the defendant. He refused so to charge, but charged substantially, that the question was not to whom the land belonged, but whether Miss Donkle owed

Kohn rent for it; that if Kohn had consented to her attornment to Printup, he could not recover; that the Statute of Limitations did not run against the mortgage *fi. fa.* so long as it was enjoined; if the decision of the Supreme Court was complied with by amending the bill, etc., and then Kohn's feoffer bought at sheriff's sale pursuant to that decision, Kohn's title was perfect, and he could recover, unless he consented for Miss Donkle to pay Printup, but if the first sheriff's sale was never set aside, Kohn's feoffer bought subject to said mortgage. The jury found for the defendant. By consent, an order was taken that plaintiff might have till thirty days from the final adjournment of the Court, to make up the brief of evidence and motion for new trial, and that the motion might be heard in vacation, etc. This was in November, 1870. In December, 1871, Judge Harvey had succeeded Judge Kirby, before whom the case was tried, and he granted plaintiff further time, till December, 1870, and then the Judge, because he was absent in December, ordered Printup to show cause why the new trial should not be granted on the 3d of February, 1871. Kohn's counsel sought to account for the long delay by affidavits as to the absence of himself and the Judge, and as to Printup's consent to take no advantage of the delay. To these Printup replied by denying any such consent. Whatever of consents were made *seem* to have been made before the Judge, when the motion was to have been heard, but for a postponement then had. When the Court adjourned does not appear, but it was more than thirty days after the final adjournment of the Court before the motion was filed and a brief of evidence made out. The grounds for a new trial were, that the ver-
dence, etc., and that the Court
testimony, in refusing to charge
ng as he did. The cause came on
Printup moved to dismiss it, be-
had not been filed in time. The
re motion, and upon hearing evi-

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dence as to what the testimony had been on the trial, approved the brief of evidence, and ordered it then filed, and after argument he granted a new trial. His refusal to dismiss the motion, and his grant of a new trial are assigned as error.

PRINTUP & FOCHE; UNDERWOOD & ROWELL, for plaintiff in error.

DUNLAP SCOTT, for defendant.

McCAY, Judge.

1. It would, as we think, be improper for this Court to interfere with the action of the Judge, in his direction of this case, during the vacation, and in his granting the rule *nisi* under the circumstances as set forth in the record. The whole matter was a question of good faith and diligence on the part of the counsel for the movant. The affidavits are painfully conflicting, and the Judge had special means to assist him in arriving at his conclusion, which this Court has not, since much of what did occur, was under his own observation. It was necessary that the brief of testimony should be approved, before the rule *nisi* was granted, and the brief filed; and if the Judge was satisfied, as he doubtless was, that it was not the fault of the movant that it was not sooner approved, we see no error of *law* in his granting the rule *nisi*, and permitting the brief to be filed. No delay of the cause was produced. The rule *nisi* would, perhaps, have been made returnable to the next term at any rate; and as this was the course the case took, we will not interfere. See *Goodwin vs. Hightower*, 30 Georgia, 249.

2. What the course of this witness, during the war, had to do with this case, we cannot see. Nothing was stated to make these questions pertinent. All that appears would, at least, be a mere act, and we know of no rule which could make any probable answer to them pertinent. Nor do we

think that clause of the Code, which declares that religious belief shall go *only* to the credit of a witness, justifies the question asked, as to the witness' belief in Christ as the Saviour. The section of the Code, 3797, simply intends that the religious belief which made a witness incompetent at common law, shall, in Georgia, go only to the credit of the witness. Has it ever, at least in modern times, been contended that a Jew was incompetent? That a want of belief in Jesus, as the Saviour, was a ground for the exclusion of a witness? We think not. A belief in a God, and in a future state of rewards and punishments, has, by some Courts, been held necessary to render a witness competent. But a Jew is competent at common law.

3. Our statute, Code, section 3601, expressly provides that the sheriff shall not, to put a purchaser of land at a sheriff's sale in possession, turn out anybody but the defendant, his heirs, or his tenant or assignee, since the judgment. Was Kohn either of the class here alluded to? *He* held by virtue of a sheriff's sale, before the judgment on the mortgage, and in no fair sense can he be said to hold as the assignee of McKenzie at all. The sale at which Morris bought, was a sale, whether legally or not, of all McKenzie's right, and the purchasers were clearly holding adversely to the mortgage. Had the mortgagor taken a decree in the equity cause against Morris, perhaps Kohn might be so bound by that decree, as that he could have been turned out to put in a purchaser under the decree. But this was not done. The sale was simply by virtue of the mortgage, and Kohn held adversely to that. Whether his title was good against the mortgage, is another question. It was not in the power of the sheriff

e. The sheriff can only turn out who are privies to the judgment. objections made upon the sale under admitting that sale to be a good one, good in such a situation towards from the objections made to it—

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we do not think the sheriff was authorized to turn Kohn out by virtue of it.

4. That a tenant cannot attorn to one holding title adversely to his landlord, will not be doubted. This is clearly the common law, and is affirmed in our Code. We do not see that the case is helped any by the fact that the adverse claimant comes with the sheriff at his heels. A sheriff may be a trespasser, as well as a private person, and the law gives a remedy against him as well as against private persons. We do not go into the evidence. There was some evidence that the attornment to Printup was with Kohn's consent, and did the case turn wholly on that, we are not sure but that the verdict of the jury is sustainable under the evidence. But, in the view we take of the case, we do not think the law was put fairly to the jury on the other points, and we affirm the judgment granting a new trial.

Judgment affirmed.

A. B. IRICK, plaintiff in error, vs. WILLIAM WISE, defendant in error.

Where Wise was the tenant of Irick under an unexpired lease, and Irick wrote him about selling his land, and stated in the letter that he would give him five per cent. to aid him to make sale, and Wise did acts equivalent to an acceptance of the proposition, by showing the land and giving notice it was for sale, and a man by the name of Crockett, with whom Wise had talked about selling the land, went to Virginia and bought from the owner, Irick, and, when he returned, Wise made him pay \$500 00 for the surrender of the possession, and upon the trial the Court rejected this evidence :

Held, That this was error. If Wise claimed the commission upon the sale of five per cent., such sale contemplated the possession of the land to be given to the purchaser ; and if he claimed the possession as against the purchaser, he could not fairly claim commission on the sale to him. And upon the trial, we hold, if the jury found, from the evidence, that Wise did aid in the sale, and was entitled to commissions thereon, this evidence was admissible to show the payment of

Irick vs. Wise.

\$500 00, which should be deducted from the commissions, as in that event the presumption is, that Irick sold for less. If Wise was to be bought out of possession, he was not entitled to both compensations.

Evidence. New trial. Before Judge PARROTT. Bartow Superior Court. December, 1871.

This case is reported in the opinion.

W. AKIN, for plaintiff in error.

WILLIAM T. WOFFORD, for defendant.

LOCHRANE, Chief Justice.

It appears from the record that William Wise, on the 28th October, 1868, sued out an attachment against the property of A. B. Irick, claiming upon account due the sum of \$1,000 00, and issuing upon the ground of the non-residence of the defendant. The declaration was filed at the proper time, and the case came on for trial upon the plea of the general issue, and the jury found for the plaintiff the sum of \$930 00 principal, with interest, and costs of suit. The defendant moved for a new trial, upon the grounds, among others :

1. That the verdict was against the weight of the evidence.

2. Because the Court rejected the evidence offered to prove after the sale to Crockett ; that Wise, as the tenant, refused to deliver up possession until paid \$500 00 by the purchaser.

The evidence disclosed that Irick wrote a letter to Wise before the sale of the land, in which he offered to pay a commission of five per cent. to Wise, for all he aided him in the sale of. Wise, in fact, sold none of the land, but he showed the land and gave notice he had it for sale. This suit was for the commissions on the sale, and, in the view we take of the case, we are satisfied the Court erred in rejecting the evidence offered. If Wise was entitled to recover commissions upon the sale, his right was based upon the idea that his acts showed his acceptance of the proposition contained in the

Garrett vs. Adrain.

letter of Irick, to pay him five per cent., and such sale of the land contemplated the delivery of possession to the purchaser. And if he, upon the sale by Irick, claimed compensation before he would deliver possession of the property and received \$500 00, he was not entitled to compensation as commission upon the sale, and compensation to deliver possession to the purchaser. This would be manifestly unjust. And we hold the Court erred in ruling out the evidence of this fact, for the amount paid by the purchaser to obtain possession from Wise, must be, at least, presumed to have embraced that amount less in the sale by Irick, and ought to have been deducted from his recovery as commissions upon the sale, as against him. If Irick was entitled to recover the commissions, his right must be founded upon the fact, that he sold, or aided to sell, the property, and anything he demanded additional for possession did not justly belong to him, but ought to be credited to Irick, upon the commissions claimed to be due by him upon the sale. And for these reasons we think the Court erred in refusing a new trial.

Judgment reversed.

ELI GARRETT, plaintiff in error, vs. WILLIAM ADRAIN, defendant in error.

Where A, being in possession of land under a bond for titles, on the payment of the purchase-money, made by B, sells the land to C, representing his titles to be perfect, and makes to C a bond for titles, to be made on the payment by C of the price agreed upon between them, and C, having no knowledge of the defect of A's title, or that his possession was only permissive, in good faith goes into possession under his purchase, pays his money in full, and remains in undisturbed possession seven years :

Held, That C has a good title by prescription, as against B, the original vendor.

Garrett *vs.* Adrain.

Ejectment. Prescription. Before Judge PARROTT. Whitfield Superior Court. January, 1871.

This was ejectment by Adrain against Garrett, begun in December, 1869. It was submitted to the Court upon this agreed state of facts: Adrain owned the land, and in 1852, sold it to McDonald, on a credit, till 1854, giving him bond for titles. McDonald took possession, but never paid but half of the purchase-money. In 1857, McDonald sold the land to Garrett, took his notes for the purchase-money, and gave him *his* bond for titles, telling him that *his* title to the land was perfect. Garrett took possession in 1857, paid the purchase-money to McDonald in 1861 or 1862, and had continuously been in possession, claiming the land as his, up to the beginning of this suit; which was the first notice he had that McDonald did not have a perfect title to the premises. Plaintiff all this while resided in Alabama. Garrett claimed that he had a good title by prescription. The Court held that he had no such title as against Adrain. This is assigned as error.

JOHNSON & McCAMY, for plaintiff in error, cited Ang. on Lien, sec. 390; 4 Ga. R., 120; 5th, 14; 7th, 389. Stamper *vs.* Griffin, 12 Ga. R....; 20th, 321; 35th, 139; 5 Peters, 401; R. Code, sec. 2637, etc.

D. A. WALKER, for defendant. Prescription not bottomed on permissive possession: R. Code, sec. 2637; 35 Ga. R., 140; 14th, 72; 4th, 85 and 471; 4 John. R., 230; 1 Cow. R., 610; 5th, 91; Adams on Eject., 33 and 56, notes; 9 Wheat. R., 288; 5 B. & Ald. R., 232; 7 Wheat. R., 555; 4 How. R., 296. A purchaser is charged with notice of defects in seller's title: 2 Metc., 625; 3 Gr. Cr. Dig., 452, note; 1 Story's Eq. Juris., sec. 400; 15 Peters' R., 115; 2 Spencer's Eq. Juris., 757; Serg. on V., 330; Hilliard on Trustees, 513; 2 Foubl. Eq., 151; 35 Ga. R., 204; 29th, 123; 3 Gr. Cr. Dig., 556, note; 4 Kent's Com., 179, etc.

McCAY, Judge.

It is a well settled rule that a permissive possession is not adverse, and cannot be the foundation of a prescriptive title against the person *permitting* the possession: Code, section 2637. But it is equally well settled, in this State, that seven years' possession, under a bond for titles, is a good prescriptive title against everybody but the obligee of the bond, and his representatives: *Fain vs. Gathwright*, 5 Georgia Reports, 6; *Stamper vs. Griffin*, 12 Georgia Reports, 450. That the maker of the bond has no title, or is in possession by permission, makes no difference. The very object of the law allowing title by prescription, is to protect a defective title against a perfect paper one, after seven years' peaceable possession. If the one who makes the bond is a mere squatter, a tenant, or is in under a forged title, or as trustee, and the purchaser buys in good faith and goes into possession, thinking his title good, he is in adversely. If this were not so, the title by prescription could never arise at all; since, if the person prescribing, must have bought from one having a *right to sell*, he gets a good title without the prescription. The only limitation put by the law on his right is, that he shall hold, under a written claim of right, in good faith, without fraud on *his* part. To say that it is his duty to inquire, is in effect to repeal the statute: since, if he is to be held, to all the knowledge, that he would learn, upon proper inquiry, is to insist that he must not buy, unless the vendor has a *good title*. We have held at this term that, though there was a prior deed from the vendor on record, yet a purchaser, who buys in good faith, and gets a paper claim of right, acquires, in seven years, a prescriptive title. As we have said, nothing but fraud, want of good faith, will vitiate his claim of right. This the law will not presume. This cannot be founded on presumptive notice, on that sort of notice which is based upon record, or which is presumed from want of diligence. Even actual no-

tice would not, in every case, be sufficient to defeat the prescription. By section 2641 of the Code, our law is, that the prescription cannot be based upon a forged or fraudulent deed, if notice thereof be brought home to the claimant before, or at the time of the *commencement* of the possession. It is very clear to us, that to make the tenant chargeable, so as to defeat his prescription, he must have gone into possession *mala fide*, corruptly. I can conceive of a case, where the notice of the want of title in the vendor is so patent, that no man of honest purposes would buy, where any man of ordinary sense would feel that to buy, and to go into possession, and set up a claim of right, would be a fraud. But it would be very unjust and contrary to the whole tenor of the authorities and of the provisions of the Code, to presume fraud, because, by diligence, the truth might have been known. The authorities referred to by the defendant in error, do establish, that a vendee is bound to make inquiry, and is chargeable with all knowledge that he could have got by such inquiry, but this is the rule in determining who has the *best title*, and does not apply to one setting up the statute. The inquiry here is, as to the *possession*. Under the law of prescriptions, the defendant does not rely upon his title, but upon his *possession*. His *title*, under the rules referred to, is defective. He is, perhaps, chargeable with notice, by some record, or *lis pendens*, or possession, etc., and his *title* is defeated. But the statute of prescriptions is based upon possession, and if that be in good faith, and not fraudulent, and his paper title be neither forged nor fraudulent, with notice to him, his prescriptive title is good : See *Conyers vs. Kenan*, 4 Georgia, 308 ; *Moody vs. Fleming*, 4 Georgia, 115 ; 9 Georgia, 44.

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The E. T. and G. R. R. Co. *vs.* Montgomery.

THE EAST TENNESSEE AND GEORGIA RAILROAD COMPANY, plaintiff in error, *vs.* JAMES MONTGOMERY, defendant in error.

Where a letter was written to B, at Rome, by the agent of the East Tennessee and Georgia Railroad Company, in response to inquiries made by B, in which he states that "arrangements are perfected for sending cotton through to New York *via* East Tennessee and Georgia and connecting lines to Alexandria by rail, and from thence by steamer, without detention, etc., etc., our rate from Dalton to New York on cotton is \$9 00 per bale. Hoping to secure a liberal share of business from Rome, I am," etc., and this letter was shown to Montgomery, who shipped his cotton to Kingston, on the Western and Atlantic Railroad, and by the way of Dalton over the East Tennessee and Virginia Railroad through to New York, and damages were incurred by delays upon the route, after it had passed over the road of the defendant:

Held, That the letter written to B, by the Railroad agent, when shown to Montgomery, did not, without some notice to the Railroad by him, that he had shipped his cotton, via Kingston to Dalton, to be shipped by them in terms of such letter, constitute in itself, an express contract, so as to bind the company for loss or delay occurring beyond its terminus.

The contract imposed by the law, (see Code, 2058,) was to deliver to the connecting road in good order and due time, and to impose a greater liability required an express contract, and the letter addressed to B, did not, upon being read by Montgomery, constitute such an express contract. And his act of sending the cotton, without notice to the company, coming over another road and transported by them as an intermediate line, could not be regarded as embracing the terms of an express contract, arising out of the letter to B, as between such consignor without notice and such road.

Where the Court, upon the trial, gave in charge to the jury principles of law contravening the law stated, it was error, and a new trial should have been granted. WARNER, Judge, dissenting.

A witness used a memorandum in answering interrogatories, which was not attached to his answers. During the trial the Judge refused to rule out his answer, only so far as they were connected with said memorandum. The defect was one of execution, and the ruling of the Judge was right. (R.)

Common-carriers. Interrogatories. Before Judge PARROTT. Whitfield Superior Court. January, 1871.

The following letter was received by one Bayard :

"EAST TENNESSEE AND GEORGIA RAILROAD COMPANY'S
SUPERINTENDENT'S OFFICE.

"CHATTANOOGA, October 28th, 1865.

"N. J. BAYARD, Rome, Ga. :

"*Dear Sir* : — Yours of 21st came duly to hand. In reply, I will say that arrangements are perfected for sending cotton through to New York *via* East Tennessee and Georgia and connecting lines to Alexandria by rail, and from thence per steamer, without detention, and with less transfers than any other line. There are three regular lines of steamers from Alexandria to New York, so that there will not be any detention at that point. Our rate from Dalton to New York on cotton is \$9 00 per bale. Hoping to secure a liberal share of business from Rome,

"I am, very respectfully, your obedient servant,

"A. A. TALMAGE, *Superintendent*."

Talmage was the superintendent of the East Tennessee and Georgia Railroad Company. Bayard shipped some cotton through from Rome, on the 30th of October, 1865. On what terms he shipped it, or whether he had then received said letter, does not appear.

Afterwards he showed this letter to Montgomery, or read it to him. Without knowing that it was genuine, except by Bayard's statement, and knowing nothing about the rates, etc., of the East Tennessee and Georgia Railroad Company, except as therein stated, Montgomery put *his* cotton in charge of the Rome Railroad, billed through to New York. Freight was to be there paid, and it was to be sold on arrival. It

ny intermediate agent knew of Tal-
such arrangement, except that these
through freight bill from points South
hat road it passed to Kingston, thence
Atlantic Railroad to Dalton, thence

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over the East Tennessee and Georgia Railroad to Knoxville, where it was safely and in proper time delivered to the East Tennessee and Virginia Railroad Company. After that it was delayed while *en route*. During this delay the price declined, and Montgomery sued the East Tennessee and Georgia Railroad for the amount lost by him by this decline.

The defense was that the cotton was promptly delivered to the connecting road "as in good order." The reply was, that the facts made a special contract by which the East Tennessee and Georgia Railroad was liable for the damage without regard to where the delay occurred.

All these facts, and the quantum, decline, etc., were shown upon the trial. Pending the trial, a motion was made to rule out a set of interrogatories because the witness answered from memoranda which had not been attached to his answers and certified by the commissioners who took his answers. What the evidence was or what the memoranda were do not clearly appear. The Court refused to rule out the whole of the answers, but did rule out all relating to the memoranda. He charged the jury that "said letter is not proof of a special contract between the plaintiff and defendant, but may constitute evidence of what the East Tennessee and Georgia Railroad were engaged to do at the time it was written. The Court construes this letter as evidence of the undertaking of the defendant to ship cotton from Dalton to New York for parties who might see proper to ship over that road. If plaintiff did ship cotton over the line mentioned in the letter, and if defendants were then engaging to ship through to New York for a certain price, at a certain shipping rate this would authorize the jury to take the case out of section 2058 of the Code, which makes the last road receiving the goods "as in good order" responsible for loss in shipment, and the several lines of railroads and steamers over which the cotton was to pass were agents or employees of defendant, aiding to carry the cotton through to New York, and upon which plaintiff had no claim for failure to perform their undertak-

ing." If defendant was not undertaking to carry to New York at a certain rate it might relieve itself under section 2058 of the Code. But if defendant agreed to ship through to New York at a certain rate, and plaintiff shipped under that arrangement, or while defendant was shipping, or offering to ship, thus for the public; or if defendant failed to deliver the cotton to the connecting road in good order and in a reasonable time, plaintiff can recover damages for his loss caused by the delay, unless this delay was from the act of God or the public enemy." Said letter is evidence of the undertaking of defendant to ship cotton from Dalton to New York for parties who might see proper to ship over that road. He refused to charge that, as to the time of delivery, ordinary diligence only was required; and accident or misfortune, though not the act of God, causing delay would not make a common-carrier liable if it used reasonable diligence to avoid the delay.

The jury found for the plaintiff. Defendant moved for a new trial upon the grounds that the verdict was contrary to the evidence; that the Court erred in not rejecting the whole of the answers to said interrogatories, and in charging as he did, and refusing to charge as requested. He refused a new trial, and that is assigned as error.

D. A. WALKER; McCUTCHEN & SHUMATE, for plaintiff in error. As to special contract: 43 Ga. R., 641. As to delay in delivering: Story on B., sec. 545, (a); 14 Wend. R., 216; Ch. on Car., 56, note; R. Code, sec. 2047; Ang. on Car., sec. 289, note.

PRINTUP & FOCHE; W. H. DABNEY, for defendant.

LOCHRANE, Chief Justice.

James Montgomery brought his action against the East Tennessee and Georgia Railroad Company to recover damages resulting from the delay in transportation of cotton

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from Rome to the city of New York. The damages proven and found by the jury amounted to \$2,000. Upon a motion for a new trial various grounds were assigned, all, however, controlled by legal principles involved in the construction of a letter set up, with the surrounding facts, as an express or special contract, upon which the liability of the defendant below is predicated.

The proof shows that Montgomery shipped the cotton from Kingston, Georgia, at a station on the Western and Atlantic Railroad, consigned to parties in New York. The cotton was received in due course at Dalton, by the East Tennessee and Georgia Railroad, and was, by them, transported over their line to their terminus at Knoxville, and, as in good order and in due time, delivered to the connecting road *en route*, or the East Tennessee and Virginia Railroad Company. The delay occurred after it left the custody of the defendant and its delivery to the connecting road. Under our Code, section 2058, defining the liability of railroads, this defendant was liable only to its terminus and for the delivery of the property to the connecting road in good order. But the difficulty of this case, if any exists, originates in the fact that A. A. Talmadge, Superintendent of the East Tennessee and Georgia Railroad Company, on the 25th October, 1865, and previous to the shipment, addressed a letter to Mr. Bayard, of Rome, in which letter he says: "Yours of the 21st came duly to hand. In reply, I will say that arrangements are perfected for sending cotton through to New York *via* East Tennessee and Georgia and connecting lines to Alexandria by rail, and from thence, by steamer, without detention, and with less transfers than any other line. There are three regular lines of steamers running from Alexandria to New York, so that there will not be any detention at that point. Our rate from Dalton to New York on cotton is nine dollars, (\$9 00) per bale. Hoping to secure a liberal share of business from Rome, I am, etc.,

"A. A. TALMADGE, *Superintendent.*"

This letter was shown or read to Montgomery, and he, acting upon it, sent his cotton from Rome to Kingston, at which latter point it is forwarded through as freight. Did this letter constitute an express contract, by which the general liability of the East Tennessee and Georgia Railroad was increased as to Bayard, the party to whom it was addressed? I think it did. It contained a proposition in writing to transport cotton to New York. This was its fair purport of construction. It presented inducements to secure the shipments. It was addressed to him, and when accepted by him, either by a response in writing or by acts equivalent, as by shipment of his cotton, my opinion is it was an express contract upon the part of the road, and accepted by him to carry his cotton to New York, and I think the railroad company, taking the benefits under it, would be, in law, justly bound, by its terms. But, conceding this proposition, did the reading of this letter to Montgomery make the defendant occupy, as to him, the same legal *status* or relationship? I think not. It is true, the letter concludes by hoping to receive patronage from Rome; but this could not fairly be held to constitute a contract for carriage with any party in Rome who may have seen, read, or heard read this letter. Therefore, in itself, it did not constitute any contract between a stranger and the railroad company. What other proof is developed by the record to aid in giving to this letter that effect? Montgomery acted upon it by sending his cotton *en route* over that road, and by the line indicated. This is all. But Montgomery, in acting upon it, delivered his cotton to the railroad at Kingston, and from that point it went over the East Tennessee and Georgia Railroad, as any other freight, and, consequently, did not come within any notice or knowledge of the railroad company, that it was shipped by express contract with them, invoking their attention farther than over their own line and to the connecting line at their terminus, receiving it "as in good order." Therefore neither the *seeing* of the letter, nor the mode of shipment, constituted an express

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contract as between the railroad company and Montgomery. The link which is absent and nowhere seen by the evidence, is notice by Montgomery of the shipment, as included in the terms of the letter to the railroad company. If Montgomery, being advised of this letter, and properly construing its terms to be a proposition to ship through to New York by connecting lines, and inviting shippers from Rome to patronize it, upon such terms, had notified the East Tennessee and Georgia Railroad that he had so shipped to them, under the proposition contained in the letter to Bayard, then, by this notice to them, he would have been entitled to claim the damages occasioned by the delay upon the line, even though accruing after it left the hands of the defendant and was delivered to connecting lines.

It is useless to discuss the doctrine of railroad liability by express contract. This I did in cases at the last term. I simply, in this case, confine myself to the facts and the opinion I entertain upon them as to whether this letter, under the evidence, constituted an express contract. And, with the view I hold, it is unnecessary to travel through the various assignments of error to the charges of the Judge. I think the law of the case entitled the party to a new trial upon the main and controlling ground in the case.

In relation to the judgment of the Court refusing to strike out the interrogatories of Montgomery, only so far as they related to memorandums not attached, I am of opinion the decision was correct. Under section 3835, all exceptions to the execution must be made in writing, and notice given before the trial, when the interrogatories have been in office, etc., and when a witness answers from memoranda, under section 3831, such memoranda should be sent with the commission and certified to by the commissioners. These objections were made upon the trial, and the defect went to the execution, and when made upon the trial, the ruling of the Court accomplished substantial justice, by rejecting the questions improperly answered, but receiving that not subject to the objection. Judgment reversed.

McCAY, Judge, concurs.

I concur in the judgment of reversal in this case. I think the charge of the Court was error. In my judgment, there was no evidence of any contract of the East Tennessee and Georgia Railroad to carry this cotton to New York, and that it was error to charge the jury that they might consider from the letter and from Montgomery's acts, whether there was an undertaking so to do. The charge also informed the jury that though the letter was not, of itself, evidence of such a contract, it was evidence that the road was then making such contracts and doing such business. In the first place, I am inclined to the opinion that, under our law, this letter was not even an offer to Bayard, by this road, to carry his cotton to New York. Fairly construed, what does this letter amount to? Simply this, that an arrangement had been made between the different connecting lines to carry cotton through from Dalton to New York, without detention, for \$9 00 per bag. By the law of England, and by the decisions of the Courts of most of the American States, it is true that a receipt of freight, destined to a distant point, binds the receiptor, who is a common-carrier, to its destination, and especially is this true, if the freight be agreed to be paid in advance or at the end of the line.

But our Code, section 2058, provides that "if there be several connecting railroads, and goods be intended to be transported over more than one road, such road shall only be liable to its own terminus and until delivery to the next connecting road." At our last term, this Court decided in the case of *The Western and Atlantic Railroad vs. McDonald & Strong*, that the mere receipt of goods destined to a distant point, and stated in the receipt as intended to be transported over several roads, even on a through rate, was not, under this section of the Code, such a contract as bound the receipting road for the whole distance. We then held that this section of

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the Code contemplated just such a case, and that the putting of the intention into writing did not alter the law. If goods are intended to pass over different roads, and be delivered by one road to the other, it must be that the freight over the whole line is to be paid at one end of the line; since, if this were not done, the goods must stop. I do not think there is anything in this letter, even as to Bayard, to make this case different from the case I have referred to. It is, at last, nothing but a statement in writing of the very case put by the Code, to-wit: there are several connecting roads, the goods are to be transported over more than one road, and to be delivered direct from one road to the next without any intermediate consignee or agent to pay the freight and tranship the goods. Nor does the use of the word "our" in the letter make the case different. Very clearly, the writer means by that word our—not his road—but all the roads.

But admitting that, as to Bayard, this letter, if he acted under it, was a special contract, is it a special contract as to Montgomery, if he acted upon it?

Now, I do not say a special contract must always be by words on both sides. One may say I will do so and so, if you will do so and so. If the person addressed acts, and lets the other know he has acted, this is the same as if he had agreed in words. What is the case here? Montgomery sees the letter; it was not addressed to him; he acts upon it and starts his cotton from Rome, destined to New York. He gives no notice that he has acted. He never deals with this road at all. The cotton comes to this road under a list or freight bill, from Kingston to New York. When this cotton went into the hands of this road, it went there as cotton delivered to the Western and Atlantic Railroad, at Kingston, to be sent from there to New York, on a through freight list from Kingston to New York. The only evidence there is that the defendant ever had this cotton in possession at all, is from its own books which, by the very same entries, show that the cotton came to this road from the Western and At-

lantic road, on a through freight list, not from Dalton to New York, but from Kingston to New York. How was this road to know that its through passage to New York was to begin at Dalton? It came to hand attended, as the books show, by a through freight list from Kingston to New York. The East Tennessee and Georgia Railroad was the second road on the line, not the first, as shown by the freight list accompanying the cotton. How were they to know, without any notice, that Montgomery intended its through passage to start at Dalton? The evidence shows that, in fact, it started as through freight from Kingston, and not from Dalton. As this road appears to have done its full duty, and as it, so far as its officers knew, was the second road on the line, and, as they had no notice that Montgomery was looking to them as the first, in my judgment they are only liable over their own line. This was a Georgia contract, and is to be regulated by Georgia law—our Code—and the road is liable who lost the cotton. This is easily ascertained. Every road keeps accurate books, and is able to show, in every case, if they have delivered goods to the next road.

WARNER, Judge, dissenting.

This was an action brought by the plaintiff against the defendant, to recover damages for the loss and detention of cotton shipped by the plaintiff on the defendant's road, on or about the 5th of November, 1865, on the faith of, and in consequence of the following letter, written to N. G. Bayard, at Rome, Georgia, by A. A. Talmadge, Superintendent of the East Tennessee and Georgia Railroad:

“EAST TENNESSEE AND GEORGIA RAILROAD COMPANY,
SUPERINTENDENT'S OFFICE,

“CHATTANOOGA, October, 25th, 1865.

“N. G. BAYARD, Rome, Georgia:

“*Dear Sir* :—Yours of the 21st came duly to hand. In reply, I will say, that arrangements are perfected for

The E. T. and G. R. R. Co. vs. Montgomery.

sending cotton through to New York *via* East Tennessee and Georgia and connecting lines to Alexandria by rail, without detention, and with less transfers than any other line. There are three regular lines of steamers running from Alexandria to New York, so that there will not be any detention at that point. Our rate from Dalton to New York on cotton is \$9 00 per bale. Hoping to secure a liberal share of business from Rome. I am, very respectfully, your obedient servant,

A. A. TALMAGE, *Superintendent.*"

This letter was shown to the plaintiff before shipping his cotton from Rome, so as to reach the defendant's road, over which it was intended to go, and was received by the defendant on its road, to be transported to New York. There is no dispute that the cotton was detained on the route between Dalton and New York, or as to the *inability* of that line of road to transport cotton over it without detention and delay. The plaintiff's damages are clearly proved by the evidence, resulting from the detention of the cotton on the line of road between Dalton and New York, and the verdict of the jury is just and reasonable, under the evidence. But the defendant contends that he is not liable beyond the terminus of his own road, under his contract and undertaking in this case, for the detention of the cotton, which occurred on the line of road between Dalton and New York, in consequence of the *defective* means of transportation on *that line of road*. What is the fair and legal construction to be given to the defendant's letter, written to induce the shippers of cotton at Rome, Georgia, to send their cotton over his road? It was an undertaking on his part that his road would ship cotton to New York, the point of destination, either by its own company or competent agents, for \$9 00 per bale, without *detention*, which was an important consideration to shippers, in view of the condition of the various lines of railroad at that time. The defendant knew, when he wrote that letter, that parties shipping cotton from Rome, to be shipped over his road, would forward it over the Rome and West-

ern and Atlantic roads, to be shipped over his road to New York, and it was to induce them to do so that the letter was written. Contracts implied by law are such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform; and upon this presumption, makes him answerable to such persons as suffer by his non-performance: 3 Blackstone's Commentaries, 154. The undertaking of the defendant in his letter was, that if the shippers of cotton at Rome would ship it over his road to New York, he had perfected arrangements for sending cotton through to New York *via* East Tennessee and Georgia and connecting lines to Alexandria by rail, without *detention*, and from thence to New York by steamers, at the rate of \$9 00 per bale from Dalton to New York. Having failed to perform this undertaking, the law makes him answerable to the plaintiff for the damages he has sustained by his *non-performance* of it. In the absence of any express contract to that effect with the plaintiff, the law will imply one from his letter, and from the fact that the plaintiff did ship his cotton over the defendant's road to New York at the rate of \$9 00 per bale, in pursuance of the terms of that letter, and which he undertook to safely deliver at the point of destination, without any *unreasonable detention*, either by himself or his competent agents, with whom he said he had made arrangements for that purpose. To allow the defendant now to repudiate that undertaking would be a fraud on the plaintiff, who shipped his cotton over the defendant's road, on the faith of it. I am, therefore, of the opinion that the judgment of the Court below in this case should be affirmed.

Solomon vs. Lowry.

WILLIAM SOLOMON, plaintiff in error, vs. DANIEL LOWRY, defendant in error.

That portion of the Act of October 13th, 1870, which allows the claimant of land subject to an execution to set-off against the judgment the losses of the claimant, by the late war, is in violation of Article 1, section 10, paragraph 1, of the Constitution of the United States, and is, therefore, void.

Constitutional Law. Relief Act of 1870. Set-off. Before Judge PARROTT. Bartow Superior Court. March Term, 1871.

Solomon owned a *fi. fa.*, founded upon a mortgage made in 1858, levied upon certain land as the property of Cooper, the assignee. Lowry claimed the land. Cooper had sold it, in 1861, to Dodd, and Dodd sold it, in 1863, to Lowry. It was admitted that the land was subject to the *fi. fa.*; but Lowry claimed the benefit of the 11th section of the Relief Act of 13th of October, 1870. He offered to prove that he, by and in consequence of the late war, had lost corn, oats, etc., taken by the armies, and a slave, etc., amounting to \$4,000 00. Over plaintiff's objection this was allowed; the Court held said section constitutional, and, under his charge, that they could do so, the jury found the property subject, but that "claimant is entitled to a set-off, on account of his losses by the war, to the amount of the judgment." Said rulings and charge are assigned as error.

WARREN AKIN, for plaintiff in error.

A. JOHNSON, for defendant.

McCAY, Judge.

This case turns upon the same principles as the case of *Gunn vs. Hendry*, from the Pataula Circuit. I have, in my concurring opinion, stated the grounds upon which I think this part of the Act of October 13th, 1870, cannot be sustained.

Judgment reversed.

Pool vs. Curry.

BENJAMIN G. POOL, plaintiff in error, *vs.* **MARGARET CURRY**, defendant in error.

If, upon the dissolution of a law firm, one of two partners gets a note for his part of the fee, evidence of his agreement to be represented in the trial of the case is competent and material, and ought to have been submitted to the jury under the charge applicable.

Partnership. Parol to vary writing. Before Judge **PARROT**. Bartow Superior Court. March, 1871.

Mrs. Curry sued Pool upon his promissory note for \$250 00 payable to Jones & Maltby, or bearer. On the trial, it appeared that Jones & Maltby were partners practicing law, and were employed by Pool to defend his son against a criminal charge, at \$500 00, \$250 00 of which was paid to Jones; that this note was given to Maltby afterwards, when he and Jones were dissolving their partnership, and Maltby was moving West, as Maltby's half of the fee.

The defendant proposed to prove that when he gave this note it was expressly agreed between him and Maltby that he would personally attend to the case or get J. A. W. Johnson to represent him. The Court rejected the evidence. It was shown that, on the trial of Pool's son, Jones alone represented Jones & Maltby, that Maltby was not present, and that J. A. W. Johnson also represented the son, but by special employment by Pool. The Court charged the jury that a law firm was entitled to the fee if any one of its members represented the firm on the trial, unless at the time of the employment there was a special contract that a particular member of the firm should represent it. The jury found for plaintiff. The rejection of said evidence and said charge are assigned as error.

W. AKIN, for plaintiff in error.

J. W. WOFFORD; **ABDA JOHNSON**, for defendant.

Pool *vs.* Curry.

LOCHRANE, Chief Justice.

The plaintiff in error employed a law firm composed of Jones & Maltby, to defend his son, agreeing to pay them a fee of \$500 00. He paid \$250 00, and, subsequently, when the firm was settling up its business, and Maltby, one of the partners, going to Texas, it was agreed, and he went to Pool and got a note for \$250 00, payable to the firm. Upon the trial, Pool proposed to prove that Maltby, at the time, agreed that if he did not attend the Court and defend the son of defendant, he would have J. A. W. Johnson to represent him, which, upon objection, was ruled out. The evidence further shows that Maltby was not present nor represented, but Jones, the other partner, appeared and defended the case. The Judge charged the jury, in effect, that law partners or firms were similar to others, and if one acted in the case, the note given could be collected. As a general rule, we recognize the doctrine, that the representation of the firm by one, is a compliance with the contract of professional service, except there is a special agreement in the premises. But we do not think this case falls within the general rule. When the law firm was dissolved, and the one who got this note for his share of the fee was removing to Texas, his obligation to be represented at the trial was a special agreement, and went directly to the consideration of the note, and ought to have been admitted by the Court and submitted to the consideration of the jury.

Judgment reversed.

Pace vs. Wilkinson.

B. F. PACE, plaintiff in error, vs. B. M. WILKINSON, defendant in error.

Where a suit was brought upon a bond for titles, alleging a breach since the 1st of June, 1865 :

Held, That no affidavit of the payment of taxes under the Act of October 13th, 1870, is required.

Tax. Relief Act of 1870. Before Judge PARROTT. Dade Superior Court. May Term, 1871.

Pace averred, that, on the 9th of August, 1862, B. M. Wilkinson bought of Gwinn certain land, and took his bond for titles, upon payment of the purchase-money, which was to be due in December, 1863; B. M. Wilkinson assigned said bond to B. F. Wilkinson and one McKenzie, without having paid the purchase-money; they assigned the bond to Tatum, and, in 1864, Tatum assigned it to him, saying that Gwinn had been paid and would make a deed upon demand. But in November, 1865, Gwinn obtained a judgment against B. M. Wilkinson for the unpaid purchase-money, a *fi. fa.* was issued and levied on said land, and plaintiff had to pay the judgment to protect the land. He prayed judgment against B. M. Wilkinson for the amount so paid out. Because plaintiff filed no affidavit that he had paid all taxes on said claim, the Court dismissed the cause. That is assigned as error.

E. D. GRAHAM; D. A. WALKER, for plaintiff in error. The breach was after June, 1865.

JOSEPH GLENN, for defendant.

McCAY, Judge.

There clearly was no debt in existence, upon which taxes were due, until the bond was broken. This, it is alleged, was not until after June, 1865. This case turns on the principle decided at this term, in the case of *Sirrine vs. Southwestern Railroad Company*, and is controlled by it.

Judgment reversed.

Bragg et al. vs. Tibbs.

ALEXIS BRÁGG *et al.*, plaintiff in error, *vs.* W. H. TIBBS,
defendant in error.

Upon the call of a case upon the docket, the counsel for the plaintiff stated to the Court that he had a motion prepared to transfer the case to the United States Court, and the Court refused to hear the motion, giving precedence to a motion to dismiss the case upon the ground of non-payment of taxes under the Act of 1870. This was error.

Removal to United States Court. Relief Act of 1870.
Tax. Before Judge PARROTT. Whitfield Superior Court.
April Term, 1871.

This suit, upon a note made in 1860, was dismissed because no affidavit as to the payment of taxes was filed, as required by the Relief Act of 1870, though plaintiff insisted upon removing it to the United States District Court pursuant to the Act of Congress, because plaintiffs were non-residents, etc.

W. K. MOORE, for plaintiff in error.

MCCUTCHEM & SHUMATE; D. A. WALKER, for defendant, cited 41 Ga. R., 417.

LOCHRANE, Chief Justice.

The plaintiff in error brought suit against W. H. Tibbs in Whitfield Superior Court, and when the case was called the plaintiff, by his counsel, informed the Court that he had an application in regular form for the removal of the case to the United States Court. The Court inquired if he had filed an affidavit of the payment of taxes, which was answered by plaintiff that he had not, but had filed the proper affidavit required by Act of Congress to transfer the case. Upon which the Court dismissed the case.

We think the Court erred in this decision. The institution of the suit constituted a case in the Court, to which a

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motion of transfer under the Act of Congress applied, and it was the duty of the Court to have heard that motion and decide it in precedence to the motion to dismiss, for reasons too obvious to invoke any discussion.

Judgment reversed.

W. W. WEST, plaintiff in error, vs. JOHN SANSOM et al.
defendants in error.

An affidavit under the Act of 13th October, 1870, in a suit pending, that the plaintiff has paid all legal taxes on the debt, since he was the owner thereof, is a substantial compliance with the Act.

An Act denying all remedy on a contract would impair its obligation and be void. (R.)

Though, under the Relief Act of 1870, plaintiff's affidavit need go no further than that all legal taxes on the claim from *him* have been paid, yet, if it appear on the trial that all taxes due thereon since its making were not paid, plaintiff cannot recover. (R.)

Tax. Relief Act of 1870. Before Judge PARROTT.
Whitfield Superior Court. April Term, 1871.

In October, 1869, West sued Sansom et al. upon their note, made in 1860, payable to Rogers or bearer. He made affidavit that he had paid all legal taxes chargeable by law thereon "since the note has been his." There was no averment when he bought it, the suit being in the Jack Jones' form. The Court dismissed the cause upon the ground that the Act of 1870 required him to swear that *all* taxes since the making of the note due on it had been paid. This is assigned as error.

JOHNSON & McCAMY, for plaintiff in error. Act of 1870 void because it impairs obligation of contracts. If not void, affidavit sufficient. Worrell vs. Adams, this term.

West vs. Sansom et al.

W. H. DABNEY; JESSE H. GLENN, for defendants.

McCAY, Judge.

1. To impose upon the plaintiff the duty of filing an affidavit that all legal taxes due on a debt have been paid, before the same ever came into his power, custody or control, is to put upon him a duty which it is almost impossible for him conscientiously to perform. It is, in effect, to deprive the true owner of the debt of all right of action upon it, since, in very few cases, is it possible for him to make the affidavit. We cannot think, therefore, it was the intent of the Legislature to go so far as this. And if it were, we should greatly doubt if so extreme a course was within its constitutional power.

2. It is well settled, by the United States Courts, that a law of a State, denying *all remedy* on a debt, is void. And the case put would seem to come within this rule.

3. If, upon the *trial*, it appears that the taxes *have not been paid*, we think, under the Act, the case would have to go, but that is matter for proof, and is a very different thing from forcing the plaintiff, on oath, to declare a matter about which he knows nothing. Transfers of debts, since the passage of the Act, may stand upon a different footing, since the parties now know what is before them, and they ought to see, before they buy, what is the truth. In furtherance of the object of the law, we should admit the evidence of any one, a previous owner, who knew the facts. We think, as the plaintiff has made affidavit that all legal taxes due by him on the debt have been paid, and it appearing, affirmatively, that he became the owner before the 13th of October, 1870, that he has substantially complied with the law.

Judgment reversed.

WILLIAM WORTHY, plaintiff in error, vs. A. KINAMON et al., defendants in error.

1. When a defendant relies on his title by prescription, he cannot tack to his own possession, the possession of prior holders of the property, unless he shows the character of that possession, as to its good faith, etc., and that he holds under the parties so having, *bona fide*, acquired possession.
2. Title by capture during a war can only be set up by the organized and recognized parties to the war, or by those claiming and acquiring title from said organized and recognized parties.

Capture. Prescription. Before Judge PARROTT. Whitfield Superior Court. November Term, 1870.

In May, 1869, Worthy brought trover against Kinamon et al. for a horse. They pleaded the general issue and the statute of limitations—four years. Plaintiff proved that in November or December, 1864, he owned and possessed the horse, when two men, following behind a body of Federal soldiery, and wearing the Federal uniform, but denying that they were soldiers, took the horse from him, and that he never saw the horse again till in 1866, when one of the defendants had him, and that he then demanded him and there was a refusal to deliver him. He introduced evidence as to his value, etc., and closed.

Kinamon testified that in the latter part of 1866 he bought the horse from one Dooly and since sold him to another of the defendants. One Morris then testified that in November, 1866, he bought the horse of one Hampton Neal, who had bought him from one Henderson, and had kept him about a week. Defendants also introduced evidence as to value, etc.

In rebuttal, plaintiff read in evidence a possessory warrant by him against Kinamon for the horse, sued out in November, 1866, which was decided against plaintiff.

The Court was requested to charge the jury: 1st. If said horse was taken by persons not members of the army the

Worthy vs. Kinamon *et al.*

capture was illegal and possession under it could not support a prescriptive title; 2d. The suing out of a possessory warrant by plaintiff against defendant for the horse was such an interruption of possession as to defeat prescription; and 3d. That defendants must show that the captors were actually members of the army. The Court refused so to charge. He charged that if defendants, or those under whom they claimed, had had quiet and uninterrupted possession of the horse four years before this suit was begun and that such possession did not originate in fraud, they had a prescriptive title to the horse, "provided, the horse has been always subject to reclamation." A possessory warrant brought and decided as stated would not defeat the prescription. If the horse was forcibly taken from plaintiff by Federal soldiers, or persons acting with and accompanying Federal forces, or adhering to the Federal cause, from one adhering to the Confederate cause, plaintiff's title would be divested unless the horse was recaptured within twenty-four hours from the capture; if the horse was so captured the title remains with him who had possession when peace was made. The jury found for defendants.

Plaintiff moved for a new trial upon the grounds that the Court erred in charging as he did, and in refusing to charge as requested. A new trial was refused, and of that complaint is made.

JESSE A. GLENN; S. PERCY GREEN, for plaintiff in error.
As to prescription: R. Code, secs. 2636, 2645, 3956, 3963.

McCUTCHEM & SHUMATE, for defendants.

McCAY, Judge.

1. To make out a good title by prescription, the defendant must have been four years in possession, *bona fide*, and under claim of right: Code, 2643. The defendant shows possession in Dooly, of Gordon county, in 1866, not four

years. To make out his prescriptive title, he insists that somebody, other than the plaintiff, must have been in possession from the time the house was taken in 1864, up to the time he came into the possession of Hampton, Dooly's vendee, in 1866. But who was that somebody? Perhaps it was the very person who, illegally, took the horse. No prescription could run in his favor. Perhaps, up to 1866, the horse was concealed, or out of the State. Perhaps the holder may have recognized the title of the plaintiff. In either of these cases, the prescription would not run: Code, 3643, 2637. To enable one to tack the possession of another to his own, he must show that he claims under that person, and the possession of that person must be such, as if continued long enough, would ripen into a title: Code, 2647.

2. There is some question in the books as to whether a capture, by a private person, during a war, who turns the property over to his government, does not vest a title in the government, or in one who gets title from the government: 1 Kent Com., 103, 104; *Ib.*, 99, 117. But private persons cannot capture for their own benefit: 1 Kent Com., 117. Under the facts as shown by the record, this was a robbery. The two men, even if soldiers, were not with their company, and they denied being soldiers. They were evidently thieves, *bummers*, men who followed the army to steal, and who formed a part of that horde of robbers who usually attend an army. We think the charge of the Court was error on both the points excepted to.

Judgment reversed.

Brown vs. The State of Georgia.

WILLIAM BROWN *et al.*, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Hog stealing is not such an offense as can be settled in 4609th section of the Revised Code.
2. In a charge of larceny, the property stolen was described as "one black pig, white listed; and one white pig, with a blue rump; both without ear marks; and, together, of the value of \$2 00, the property of James Drake:"

Held, That this description is sufficient.

Criminal Law. Before Judge HARVEY. Oglethorpe Superior Court. April Term, 1871.

These defendants were indicted in the District Court for hog stealing. The animals were described in the indictment as being "the personal goods of William Agee, to-wit: one black pig, white listed, one white pig, with blue rump; said pigs having no ear marks, of the value of two dollars." The defendants pleaded that they had settled the case with Agee before prosecution. This plea was demurred to, and the demurrer was sustained. The defendants were convicted. They moved an arrest of judgment, upon the ground that the description of the stolen property was insufficient. This motion was overruled. *Certiorari*, on the grounds that the Court erred in said rulings, was dismissed, and the judgment affirmed. This is assigned as error.

JOHN C. REED, for plaintiffs in error.



H. T. MORTON, District Attorney; J. D. MATTHEWS, for the State. As to settlement, R. Code, secs. 4609, 4336, 2790, 199; Cobb's New Digest, 864. As to description, Revised Code, sections 4332, 4334. 1 Gr. on Ev., section 440; Ch. Cr. L., section 236: 10 Ga. R., 56; Taylor vs. State, this term.

McCAY, Judge.

1. Larceny, even of hogs, was, by section 105, of the old

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Code, punishable by fine and imprisonment. It may be punished by fine *and* imprisonment, under the Act of 1865, providing a general punishment for all misdemeanors. This offense was not, therefore, one that could be settled under section 4609 of the Code. There are other objections to this plea of settlement, but this is sufficient.

2. The description of a thing must be always one of degree. It would be an encouragement to crime to require every imaginable mark of identity to be mentioned. Certainty to a reasonable intent is all the law requires.

In this case, the animal is called a *pig*, a designation which indicates, to *some extent*, its age and size. Its color is given, and that it had a white list around the neck. It is added, that it was not marked. The sex is not mentioned, but as was well said in the argument, the sex of a *pig* is not apt to be noticed. We think the description sufficient. The Code does not require the sex to be stated, as in the larceny of a horse. We think the size, age, color, prominent flesh mark, the statement that there was no ear mark, and that both pigs, together, were worth \$2 00, is sufficient.

Judgment affirmed.

EXECUTORS OF L. J. DUPREE, plaintiffs in error, *vs.* LUCY Y. DUPREE *et al.*, defendants in error.

Probate of Will. Oglethorpe county. April, 1871.

MCCAY, Judge, being brother-in-law of one of the executors, who was propounding the will in controversy, would not preside. Counsel for propounders moved to strike that executor's name from the record. Two Judges presiding said he could not do so.

He then moved to sever as to plaintiffs in error, and then

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to decline to litigate as to that executor, citing 6 Georgia Reports, 210; 10th, 1, etc. This was refused.

The cause was then argued before two Judges, but the judgment was postponed till next term, LOCHRANE, Chief Justice, "not being able to give it attention."

LINTON STEPHENS; PEEPLES & STEWART; REED & MORTON, for propounders.

B. TOOMBS; J. D. MATTHEWS, for defendant.

JOHN S. BYRNE, plaintiff in error, vs. EZEKIEL ATTAWAY,
defendant in error.

Where it appeared from the record that A brought an action of trover to recover a wagon, which belonged to the Confederate States at the time of the surrender of General Joseph E. Johnston, and subsequent to such surrender was given to the brother of A, who was at work for the Confederate States authorities at Augusta, by the Confederate States Quartermaster, who gave it to A, and after such giving to A he took it from the depot at Waynesboro, where it was, and ran it off into the swamp, where B's negroes found it, and B had it brought to his house and repaired, etc., and afterwards, hearing that A claimed the wagon, B reported it to the United States authorities, who gave B the possession and the use thereof; and, upon the trial, the Court rejected the written evidence of this possession by the Federal official in command of the District of Georgia, and charged the jury "that the receipt of the wagon by Attaway from a Confederate Quartermaster in settlement of his wages was a valid payment, and conferred a complete title, although the same was made after such surrender," and refused to charge as requested by defendant's counsel as to the effect of the surrender, as to property, etc., and the jury found for the plaintiff, and a motion made for new trial upon the several grounds was overruled by the Court :

Held, That the Court erred in its view of the law of this case. The defendant had a right to the evidence rejected, for the written permission of the authorities of the United States touching property captured or surrendered to it by the Confederate States authorities was admissible and proper evidence for the consideration of the jury.

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The territory over which General Johnston had command, and which was covered by the surrender to General Sherman, being a part of the public history of the country, it was the duty of the Court to take cognizance of it without any proof of the fact, and the terms of this transaction being within the territory so embraced by the surrender, all property controlled by each military organization commanded by General Johnston was surrendered by him; and the Confederate States Quartermaster had no power, and could confer no title to the same by any act of his; and the surrender, without actual manual possession of the property surrendered by the United States authorities, conferred to them the title or right of possession to such property surrendered, and their disposition of such property was competent by such military orders as that government may have ordered, and admissible in evidence to show the fact, and are conclusive against any one claiming by Confederate States title, when such orders have been procured without fraud, and are properly proved.

Trover. Capture in war. Evidence. Before Judge GIBSON. Burke Superior Court. May Term, 1870.

Attaway brought trover against Byrne for a wagon. On trial, it appeared that Attaway's brother was a detailed soldier of the Confederate States, at Augusta, Georgia, when General Johnson surrendered its forces to General Sherman, of the United States, including the forces at Augusta. His pay as soldier was in arrear and the Confederate States Quartermaster, at Augusta, after the surrender, and when the Confederate States troops were disbanded, told him that the Confederate States currency was worthless and that he might take a wagon belonging to the Confederate States, at Waynesboro, Georgia, for his pay. He then told his brother, the plaintiff, of this, and that he might have the wagon. Thereupon plaintiff took the wagon and hid it to keep it from falling into the hands of the United States forces. Subsequently he found it in defendant's possession and demanded it, but he would not give it up. He proved its value, etc., and closed.

For defendant, it appears that Byrne found the wagon in the swamp where Attaway hid it, took it, repaired and used it, till the United States Provost Marshal ordered all Con-

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federate States property brought to him; that he then took it to the Provost Marshal who told him he might keep it; that, after Attaway said it was his, the Assistant Quartermaster of the United States, at Augusta, upon a statement of the facts, gave Byrne written permission to keep it. He offered this writing as evidence, after proving its execution, but it was rejected. He testified that General Johnston's surrender covered all the Confederate States forces in Georgia. Defendant's counsel requested the Court to charge the jury that, by said surrender, the title to all Confederate States property in Georgia passed to the United States, and no agent of the Confederate States could pass title to it in payment of wages or otherwise. The Court refused so to charge, but charged that if said wagon was paid to Attaway for his wages as soldier as aforesaid he got title, though it was done after such surrender, provided the United States forces had not then reduced it to actual manual possession. He further charged that the surrender conveyed the title of only such property of the Confederate States as was in the actual use and control of Johnston's army in North Carolina at the time of the surrender; that the Court could not take judicial notice of the limits of the territory commanded by General Johnson, but it must be proved. Further he charged that the verbal permission of the United States Provost Marshal for defendant to keep the wagon could not avail defendant in this action.

The jury found for plaintiff the value and hire of the wagon. Defendant moved for a new trial upon the grounds that the verdict was contrary to the evidence, etc.; that the Court erred in refusing to charge as requested and in charging as he did. The Court refused a new trial, and error is assigned on said grounds.

J. J. JONES; A. M. ROGERS, for plaintiff in error. The Court should have judicially noticed the extent of Johnston's command: 2 War of the States, by Stephens, 628: 1 Gr. on

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Ev., secs. 4, 5, 6 ; R. Code, sec. 3698. All C. S. property in Johnston's territory passed to U. S. by Johnston's surrender: 2 War of the States, 807. Plaintiff in trover must show title or possession: 2 Bou. L. D., 606 ; 1 Yeates' R., 19 ; 3 S. & R., 509 ; 15 John. R., 205, 349 ; 16th, 159 ; 1 Humph. R., 199 ; 2 Sel. N. P., 1377 ; 3 Pick. R., 258 ; 9th, 156 ; 22d, 535 ; 2 Gr. on Ev., sec. 636 ; 1 Kelly R., 381 ; 23 Ga. R., 63. Defendant may rely on title of stranger: 2 Gr. on Ev., sec. 648, and authorities there cited ; 19 Ga. R., 285.

S. A. CORNER, for defendant.

LOCHRANE, Chief Justice.

The question raised in this case, is as important as it is anomalous. After the surrender of General Johnston to the United States forces, every species of property was embraced by the surrender, which was controlled by the military organizations within the jurisdiction of General Johnston's command, and all right, title and possession, passed to the United States over the property surrendered ; and the transfer of this property sued for, made by a Confederate States Quartermaster, subsequent to the surrender, was null and void, and could convey nothing to the party claiming under it. And we, therefore, hold, that the Court erred in charging the jury to the contrary. We hold again, that it was error in the Court to reject the evidence offered by the defendant protecting his title on the trial of the action of trover, as written permission given by the United States authorities relative to property captured or surrendered to the United States by the Confederate States authorities. It was admissible for the consideration of the jury, as such surrendered property was within the control of the United States, and the disposition of it by the military orders of that government was competent and proper evidence to have been submitted

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upon the trial of the case, and ought to have been held by the Court as conclusive against any one claiming title through the Confederate States. And the only question to be determined by the jury, was the fact of whether the property was surrendered, and whether the military order disposing of it, was obtained fairly and without fraud. For, if the property sued for was, in fact, embraced by the surrender, and the United States authorities had disposed of it by an order procured without fraud and properly proven, it was admissible and conclusive as to the merits of the case. And we, therefore, reverse the judgment of the Court below refusing a new trial.

Judgment reversed.

RUST, JOHNSTON & COMPANY, plaintiff in error, *vs.* REBECCA BILLINGSLEA *et al.*, defendants in error.

MILTON CREIGHTON, trustee, plaintiff in error, *vs.* JOHN R. JONES, administrator *et al.*, defendants in error.

This was a bill filed by the administrator of Billingslea, for direction as to the payment of the debts of his intestate, out of the assets in his hands, (the estate being insolvent,) including the widow's right to dower, homestead, etc :

Held, That the necessary expenses of the administration, including the provision allowed for the support of the family of the intestate, be paid out of the general funds of the estate :

Held also, That the decree of the Court below in favor of Milton Creighton, trustee, etc., be affirmed as to the amount thereof, and being a debt due by the intestate as *trustee*, is to be paid next after the expenses of administration and the year's support of the intestate's family. It appears from the record, that on the 11th of October, 1866, the intestate, Billingslea and Vason, jointly purchased from Jones, the Mott and Clayton plantations, gave their joint notes therefor, Jones making a deed to them jointly for the land, and they, at the same time, jointly executed a mortgage to Jones, on the land, to secure the payment of the notes given for the purchase-money thereof. The pur-

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chasers of the land occupied it jointly for one year, then Vason relinquished his interest in it to the intestate, who occupied and cultivated the same to the time of his death, on his own account. Jones was no party to the contract between Vason and Billingslea :

Held, That the *seisin* of the intestate of the land embraced in the Mott and Clayton plantations, was sufficient in law, under the provisions of the Revised Code of this State, to entitle his widow to dower therein ; that a mortgage in this State is only a security for a debt, and passes *no title*; that the mortgage on the land was a *lien* created by the parties making it, which cannot defeat the widow's right to dower ; that, inasmuch as the mortgage lien on the undivided half of the Mott and Clayton plantations was not created by the intestate as the *husband* of the widow, but by Vason, who subsequently conveyed the land to the intestate with the incumbrance of the mortgage thereon, the widow, before she can enjoy her dower in the undivided half of the land conveyed to her husband by Vason, with the incumbrance of Jones' mortgage, must first discharge that incumbrance created thereon by Vason to Jones, the same not being a lien created by *her husband*, but a lien which existed on the land at the time the husband acquired his title thereto from Vason. It is also disclosed by the record, that, on the 31st of January, 1868, Billingslea, the intestate, drew his draft in favor of Thomas Hill, for the sum of \$4,822 39, payable 15th November next after date, upon Messrs. Rust, Johnson & Company, Albany, and to secure the payment of that draft, the intestate, on the same day, executed his mortgage deed to Hill for his undivided half interest in the tract of land, known as the Hill plantation, the sum specified in the draft being the amount due Hill by the intestate, for his share of the original purchase-money for the Hill plantation. This draft was accepted by Messrs. Rust, Johnson & Company for the accommodation of the drawer, and paid by them as such accommodation acceptors, they having no funds of the intestate drawer in their hands at the time of their acceptance of the draft. It also appears from the record, that Rust, Johnson & Company refused to accept the draft of the intestate, unless the mortgage was made, and that it was agreed that the mortgage should be transferred to them on payment of the draft by them. The draft was paid at maturity, and the mortgage was transferred to them on the 25th of November, 1868 :

Held, That, under the general rule applicable to the payment of the debt by accommodation acceptors, or securities, they would have been entitled to the transfer of the mortgage; most certainly, they were entitled to such transfer, under the *special agreement* of the parties, as shown by the record, and were entitled to the same specific lien on the Hill plantation, or the proceeds of the sale thereof, as the original mortgagee, and to have the same paid according to the priority of its lien upon that specific property included in the mortgage.

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Held also, That the widow of the intestate was not entitled to a homestead and personal exemption out of his property, in addition to her dower and provision for her year's support.

Held further, That the factor's lien of Rust, Johnson & Company, was not entitled to priority of payment out of the proceeds of the crops made on the Mott and Clayton plantations, in the years 1868 and 1869, on the statement of facts disclosed in the record.

Held also, That overseers, unless they are employed as common day laborers, and work as such on the plantation, are not entitled to priority of lien for the payment of their wages, under the Act of 1869.

Distribution of Estates. Liens. Practice Supreme Court. Before Judge CLARK. Dougherty Superior Court. February Term, 1871.

In September, 1868, Francis A. Billingslea died intestate, leaving large personal and real property to be divided between his wife and five minor children, and his creditors, according to law. Jones, as his administrator, took charge of all his property, and under an order of Court, for that purpose, worked his plantations for the year 1869. Subsequently, he filed a bill asking the direction of the Court as to the conflicting claims of the widow and creditors. They, severally, answered, setting up their respective claims, and by consent, the parties agreed that the Chancellor should decide the questions of law and facts, subject to review by the Supreme Court. Judge Strozier being interested, Judge Clark presided by consent. It appeared that intestate died possessed of two plantations in Dougherty county, well stocked with provisions, mules, etc., and a joint interest, with one Davis, in another stocked plantation in said county, with the cotton crop raised thereon in 1868. This last plantation was known as the Hill place, the others as the Mott and Clayton places, respectively. The administrator had sold all the personalty and all the realty, except the Mott and Clayton places, under consent that the liens should follow the proceeds, and held the proceeds and said places, subject to the order of the Court. The bill showed that the assets were

not sufficient to pay all the debts, and the question to be settled was, which creditors had priority of lien, etc. These claims, with the special facts touching each, were as follows :

Jones, the administrator, claimed for himself, individually, payment of a note made by intestate and one Vason, jointly, on the 11th of October, 1866, due the 1st of January, 1868, and payable to Jones or bearer. This note was for part of the purchase-price of the Mott and Clayton places and the stock thereon, which Jones had that day sold to intestate and Vason, and they had given Jones this and a mortgage on said Mott and Clayton places, and the stock thereon and the crops to be raised thereon in 1867, to secure this balance of purchase-money. The delivery of Jones' deed to intestate and Vason and their said note and mortgage to him were simultaneous, and done at the time of the purchase.

Intestate paid his half of the purchase-money to Jones, he and Vason bought jointly and gave this note and mortgage for the balance ; they farmed together in 1867 on said places, then dissolved the partnership, and left intestate in possession of the places, and agreed with Vason to pay said note and let him out of the firm ; and thenceforward intestate farmed said places on his own account exclusively. Jones was not a party to the agreement as to intestate's paying this note. Jones denied that the widow was dowable out of this land until this mortgage debt was paid, and claimed that his lien on these lands, stock and crop of 1867, took priority of all other liens.

Cyrus A. Billingslea, and Milton Creighton as trustee of James Billingslea, claimed that Francis A. Billingslea, while in life, was the executor of the last will and testament of his father, Francis Billingslea, late of Taliaferro county, deceased, and under that will received into his hands as trustee of an idiot brother, John, a large amount of money, personal property and negroes, all of which he held in his hands as such trustee, and managed from its receipt by him to his death, except the negroes, which he held to their emancipation, and that intestate died with this trust fund in his hands

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unaccounted for, which, it was claimed, amounted to a very large sum, and which Cyrus A. Billingslea and Creighton as trustee, claimed to be superior in dignity, and prior to all other liens and should be paid by the administrator out of the assets of the estate in his hands prior to all other demands against the estate. Pending the hearing, it was discovered that the accounts of this claim were too extended and complicated to be ascertained in this hearing, and by general consent it was referred to a Master in Chancery to investigate said claim and the account respecting it, and to make his report at a subsequent term, which was done, and that the hearing of these causes be suspended until that report should come in. Subsequently, said Master reported in favor of said claim, and stated the amount due to these claimants, which report was made the judgment of the Court, and the hearing of this cause was resumed.

After the death of Francis A. Billingslea, his widow applied to the Court of Ordinary of Dougherty for twelve months' support under the statute, and the sum of \$5,188 53 had been set apart and allowed. This sum had been paid to her by the administrator, and it was claimed that this payment had precedence over all other claims.

Rust, Johnston & Company claimed that the estate of Billingslea was indebted to them on their acceptance of his draft, drawn in his lifetime, in favor of Thomas Hill, dated 31st January, 1868, accepted by them, the payment of which draft was secured by a mortgage to said Thomas Hill, on his (Billingslea's) interest in the Hill place.

This draft was to fall due in November, 1868. Rust, Johnston & Company had no assets of intestate, but accepted solely for his accommodation, with the understanding that if they paid the draft this mortgage should be transferred to them.

This acceptance had been paid off by Rust, Johnston & Company at its maturity, and after the death of the payee and mortgagee, and the mortgage subsequently assigned by

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the representatives of said Thomas Hill to Rust, Johnston & Company.

When the land covered by this mortgage deed was offered for sale by the administrator, Jones, the administrator and Mrs. Billingslea had entered into a written agreement in respect thereto, of which the following is a copy, which was read and put in evidence in this connection, and in respect to the widow's claim of dower :

“ John R. Jones, administrator, *vs.* Samuel Mayer, agent R. A. Billingslea, J. A. Davis and others. Bill of injunction, etc. Answer and cross-bill.

“ It is agreed between the parties in the above case that the whole of the property, except the ‘ Mott plantation ’ of said estate, be sold as advertised, on the first Tuesday in December, 1869, it being understood that Mrs. Billingslea consents to the same, and waives all claim of dower upon the other lands, but claims dower in the whole lands, and homestead to be located on said plantation (the Mott place) in the Second District of said county, consisting of lots Nos. 255, 254, 265, 266, 267, and also claims personalty exemption in the Hill place, but consents to the sale of the property, and will claim the money arising from the sale. Signed,

“ R. A. BILLINGSLEA.

“ JOHN R. JONES, *Administrator.*”

Rust, Johnston & Company had thereupon consented in parol to let the administrator sell the whole title to said lands, (the decedent's undivided half of said Hill place,) that the purchaser might take the title freed from the mortgage, and on the agreement of Jones, the administrator, the lien was to attach to the proceeds of the sale in his hands, in the same manner and to the same extent as it did to the land itself. On this understanding the land was sold. Jones, as the administrator, also realized from the sale of the cotton

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crop of 1868, and from the sale of the personal property on the Hill place, and of cotton made on the Hill place by John A. Davis, \$1,460 00 ; and from the sale of personal property on the Mott and Clayton places, including the crops made on those places in the year 1869, (of which the sum of \$1,394 90 was raised from the sale of subsequently purchased property on these places not subject to said mortgage, in favor of Jones,) and from the sale of other personal property and other sources. He also received the rent of the Mott and Clayton places for the year 1870. He had paid out the sum of \$17,553 26, including a part of his commissions on these amounts, and including also the sum allowed to the widow for her twelve months' support.

Rust, Johnston & Company claimed that the said estate was indebted to them as factors, in a further sum, for advances made to the said Francis A. Billingslea during the year 1868, and while he was in life, by their acceptances of his drafts on them, and which they afterwards paid to enable him by their negotiation to purchase provisions, supplies and materials to make the crop of that year, and on the express agreement that these acceptances should constitute and be a factor's lien on the crops of said Billingslea made by him in the year 1868, and that by the aid they extended on this agreement the said Billingslea was enabled to make his crop that year.

As to this last claim, it was shown that the drafts were for money to get general supplies for the plantation, coffee, sugar, bacon, etc., but none for commercial manures. While it seems to have been understood that Rust, Johnston & Company had a lien on intestate's crops of 1868 for said advances by accepting his drafts, there was no writing to that effect. Scheffer & Nephews had made an advance to intestate in June, 1868, for which he had given them his note and a bill of sale of one hundred bales of cotton of the then growing crop to be delivered to them and sold to pay said advance. This paper had never been recorded, but Scheffer

& Nephews claimed that they made the advance as factors to help him raise said crop, and that they had priority of lien on the proceeds of that crop in the administrator's hands. Samuel Mayer claimed a lien on the proceeds of the crop of 1868 for certain supplies sold to the laborers who raised it and to intestate. He showed no agreement for a lien.

Four persons who had overseed for intestate on said plantations, and were not paid, claimed a general lien on his estate as laborers.

One Buttrell and William Billingslea, each, held mortgages in their respective favors, on the Mott and Clayton places, but both were younger than Jones' mortgage. The widow claimed dower in the Mott and Hill places, and one-third of the proceeds of the Hill place, or the money value of such dower in lieu thereof. And she also insisted that a homestead should be set apart for her from the Mott and Clayton places, and an exemption of \$1,000 00 in gold, from the personal property of the Hill place, sold under said consent. All the proper papers in proper shape, and all the attending facts were shown to the Court. Other debts were proved, but are no way important here. The Chancellor decreed that Jones, as administrator, should distribute as follows :

1st. Expenses of administration, including costs, commissions, personal expenses and counsel fees, (to which each party taking under this decree should contribute *pro rata*,) and expenses of last illness.

2d. That Jones should retain the balance of the purchase-money due for the Mott and Clayton places, out of any funds in hand, in order to make way for the dower on said places, unless the creditors would consent to pay the widow \$3,500 00, in full of her claim of homestead and dower. If this was done, then this note was to be paid out of the proceeds of the Mott and Clayton places and the stock and crop thereon mortgaged.

3d. The widow was to have dower in the proceeds of the

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half of the Hill place and in the Mott and Clayton places, after the purchase-money should be paid to Jones, and she and her children were to have a homestead in the Mott and Clayton places, "subject to the dower after the purchase-money is paid." If she and the creditors consented, \$3,500 00 was to be paid to her in full of both claims. If not, commissioners appointed by him, were to assign dower and homestead, subject to dower in the proceeds of the half of the Hill place and of the proceeds of the Mott and Hill places, after their sale and after paying out of it Jones' mortgage.

4th. Davis, as surviving partner, was to have the amount due him out of the proceeds of the half of the Hill place and the property thereon.

5th. The amount due Creighton, as trustee, was to be paid.

6th. Rust, Johnston & Company, as acceptors, holding the transferred mortgage of Hill, were to take the proceeds of the Hill place, of the crops of the Mott and Clayton places, after paying purchase-money, dower, homestead and expenses of administration, trust funds, etc., aforesaid.

7th. He held the liens of the overseers to be good as laborer's liens, but only as against the crops raised after they began overseeing for intestate. But he ordered Rust, Johnston & Company's factor's lien paid before them, because older. And he allowed Scheffer & Nephews a factor's lien, to take effect according to its date.

8th. Next the Buttrell and Billingslea's mortgages were to be paid according to dates. And if anything remained, it was to be paid *pro rata* to the general creditors.

Rust, Johnston & Company assign as erroneous—

1. So much of said decree as requires each party receiving money under it to contribute, *pro rata*, to the payment of counsel fees, or other expenses paid out by the administrator.

2. That part of said decree which directs the mortgage debt of Jones against William J. Vason and the intestate, to be paid out of any money in the hands of the administrator, to make way for dower for the widow on the Mott and Clayton places.

3. That part of said decree which appropriates the proceeds of the sales of the Hill place, covered by this mortgage debt, to the payment of Jones' mortgage debt on the Mott and Clayton places, against William J. Vason and the intestate, to the exclusion of this debt, its payment, and in displacement of their mortgage lien on said fund.

4. That part of said decree allowing dower and homestead to the widow, in the Mott and Clayton places.

5. That part allowing the widow's claim for dower or money in lieu thereof, in the money arising from the sale of the "Hill place," after her waiver of that claim and the sale of the land under that agreement.

6. That part appropriating the proceeds of the sales of the personal property on the Mott and Clayton places, or any part thereof, to the payment of the mortgage debt of Jones against William J. Vason and the intestate, in preference to the payment of their individual debt and liens, and of the other creditors against the intestate, out of the proceeds of the sale of the same.

7. That part of said decree appropriating the proceeds of crops of corn and cotton, made on the Mott and Clayton places in the years 1868 and 1869, and especially of the cotton received and sold by Jones, made on these places in 1868, in preference to their factor's liens on said crops, and particularly said cotton, or the proceeds of the sale of said cotton, and in preference to the claims, debts and liens of all other creditors.

8. That part which appropriates the proceeds of the sales of the Hill place covered by their mortgage, and to that extent to the payment of the debt in favor of Milton Creighton, trustee of the children of James Billingslea and Cyrus A. Billingslea, in preference to the mortgage debt and lien of Rust, Johnston & Company, and its displacement or postponement for that purpose, their said mortgage debt and lien being for the purchase-money due on said land.

9. That part which gives overseers the character of laborers and directs them to be paid accordingly.

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Creighton, as trustee, with other things not insisted on here, says the Court erred in charging him with his *pro rata* of counsel fees and expenses of administration; in allowing Jones to retain his balance of purchase-money out of any money in his hands, to make way for dower, etc., because, while he has a lien on the mortgaged property more dignified than dower, the Chancellor ought not to give him a lien on the general estate in lieu thereof, and because the Mott and Clayton places were subject to the firm debt of Vason & Billingslea, and firm debts should be confined to it; in allowing the widow's homestead as against said Jones' vendor's lien, and over Creighton's trustee's lien; in allowing dower in the proceeds of the half of the Hill lot, in the face of her said agreement in postponing this trust claim till dower, etc., was provided for, and lastly, in giving Rust, Johnston & Company's mortgage effect against the proceeds of the half of the Hill place, sold as aforesaid.

NOTE.—When the cause was called here for argument a motion was made to dismiss the bill of exceptions of Rust, Johnston & Company because some of the notes used in evidence below were not copied in the bill of exceptions. It was replied, that they were copied in the answers. While looking to see if this were so some of the answers were found to be missing. Thereupon counsel for Rust, Johnston & Company moved to suggest a diminution of the record to get said answers. It was objected that he was too late. But the Court said the suggestion of diminution might then be made, under the circumstances. Finding that this would work a postponement of the cause till the next term, the motion to dismiss was withdrawn, it was conceded that these missing answers were not material to an understanding of the cause, and argument proceeded. By consent, Creighton's case was argued with this.

LYON, DEGRAFFENREID & IRVIN; VASON & DAVIS, for Rust, Johnston & Company.

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WILLIAM E. SMITH, for Creighton, trustee.

HINES & HOBBS ; D. H. POPE ; WRIGHT & WARREN ;
C. B. WOOTTEN, for the widow and other creditors.

WARNER, Judge.

1. It is considered, ordered and adjudged that the judgment and decree of the Court below be reversed, it being the opinion of this Court that the necessary expenses of the administration, including the provision allowed for the support of the family of the intestate, should be paid out of the general funds of the estate.

2. That the decree in favor of Milton Creighton, trustee, etc., should be affirmed as to the amount thereof, and be paid next after the expenses of administration and the year's support of the intestate's family.

3. That the widow of the intestate is entitled to dower in the undivided half of the Hill plantation, and in the Mott and Clayton plantations, but she is bound to discharge the incumbrance of Vason's mortgage to Jones on the one undivided half thereof, which existed prior to the *seizin* of her husband of that undivided half of said last named plantations.

4. That Rust, Johnston & Company, assignees of the mortgage made by the intestate to Hill, have a specific lien on the property covered by the mortgage, and are entitled to have their mortgage debt paid out of that property according to the priority of its lien on that specific property after the widow's dower shall have been allowed.

5. That the widow of the intestate is not entitled to a homestead and personal exemption out of his property, in addition to her dower, and provision for her year's support.

6. That the factor's lien of Rust, Johnston & Company is not entitled to priority of payment out of the proceeds of the crops made on the Mott and Clayton plantations, in the years 1868 and 1869.

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7. That the overseers, unless they worked as common day laborers on the plantations, are not entitled to priority of lien for the payment of their wages.

It is further ordered and adjudged, that the Court below proceed to hear the case, and to order a distribution of the assets of the intestate estate in conformity to the judgment of this Court on the questions decided by it on the exceptions taken to the decree, and that so much of the decree of the Court below as was not excepted to stand affirmed, and that the Court decree a sale of the Mott and Clayton plantations so as to enable the widow to have her dower out of the proceeds thereof, as she has made her election to do so, and to apportion the proceeds of the sale of the Mott and Clayton plantations and the proceeds of the sale of the Hill plantation (which has already been sold) to the payment of the widow's dower, she being entitled to her dower in the one undivided half of the Hill plantation, and to her dower in the proceeds of the sale of the Mott and Clayton plantations, on discharging the incumbrance created by Vason's mortgage on the undivided half of the land to Jones; and after the widow's claim of dower is paid the balance of the proceeds of the sale of the specific lands covered by the respective mortgages, to be applied to the payment of the respective mortgage liens on the specific property mentioned therein. And if, in the payment of the assets as hereinbefore directed, there should not be sufficient assets of the intestate's estate in the hands of the administrator without intrenching upon the specific mortgage liens, then the respective mortgage liens on the specific property to abate in proportion to the respective amounts thereof.

Judgment reversed.

McCAY, Judge, concurred, but furnished no opinion.

LOCHRANE, Chief Justice, dissented, but gave his reasons therefor in *Slaughter vs. Culpepper*, *post*, next case.

Slaughter vs. Culpepper et al.

M. J. SLAUGHTER, plaintiff in error, vs. BRYAN CULPEPPER et al., defendants in error.

Under sections 1758 and 1759, of the Revised Code of this State, which provide that a widow is entitled to dower in all lands of which her husband died seized and possessed, and that no lien created by the husband during his life shall in any manner interfere with the same, a mortgage made by the husband, for the purchase-money, cotemporaneously with the deed to him by the vendor, passing, as it does, "no title," and being only a lien created by the husband, is no bar to her right of dower, nor is her dower subject to the same.

A widow is, in this State, entitled to dower in lands bargained by the husband, in his lifetime, to a third person, the purchase-money remaining unpaid and the title to the land being retained by the husband, in himself, until his death. LOCHRANE, Chief Justice, dissents.

Dower. Before J. E. BOWER, Judge, *pro hac vice*. Mitchell Superior Court. May, 1871.

Judge Strozier being interested in this cause, an attorney was, by consent, made Judge *pro hac vice*. The case made for his decision, was this: In December, 1861, at the executor's sale of David Culpepper, William Slaughter purchased a plantation on credit, took a deed from said executor for said land, and simultaneously gave his notes for the purchase-money, and a mortgage on said land to secure them. In 1862, Slaughter agreed to sell Cochran said land for a note on one Green, indorsed by Cochran, and gave Cochran a bond conditioned to make him or his assigns title to said land when said Green's note was paid. Under this contract, Cochran took possession of said land, and was in possession of it, as his own, when Slaughter died, in 1863. Green's note was not paid at maturity. It was sued to judgment, a part of it was paid and is held by a Receiver of said Court, as part of Cochran's estate, but claimed by creditors of Cochran and Slaughter. Culpepper's executor foreclosed said Slaughter's mortgage, and had the *fi. fa.*, founded upon the rule absolute, levied upon said land, and the land was sold thereunder by the sheriff to Culpepper, who sold it to Baggs

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& Collins, and they went into possession of it. Pending the rule to foreclose said mortgage, Slaughter's widow applied for dower in said land. The sole question was, was she dowerable in said land? The Court held that she was not and that is assigned as error.

HINES & HOBBS; VASON & DAVIS; G. J. WRIGHT, for plaintiff in error.

LYON, DEGRAFFENRIED & IRVIN, for defendant.

McCAY, Judge.

Were this Court authorized to determine the question made in this record, upon its conceptions of what ought to be the law, we should not hesitate to decide for the defendant in error. It is manifestly unjust, that the widow of the vender of land, should have her dower in it until the purchase-money is paid. And yet, both in England and in this State, if the title has passed to the vendee, the rule is well established that the right of dower attaches, even to the exclusion of the vendor's lien. And this, after solemn argument, was the decision of this Court, in the case of *Clements vs. Bostwick*, 38 Georgia Reports, 1. That the vendor does not, reduce his lien to writing, in the shape of a mortgage, but suffers it to rest upon the right given him by the law, can make no difference as to the justice of the case. It is just as *inequitable* to give the wife dower in land that is not paid for, and which has resting upon it the vendor's equitable mortgage, as to give her dower in land which has resting upon it a formal mortgage, put into writing for the purchase-money.

But it is not for Courts to set up their notions of justice, against the legislative will. Our statute, Code, section 1753, expressly provides that the wife shall have dower in all lands of which her husband died seized. And section 1759, provides that *no lien* created by the husband during his lifetime

shall, in any manner, interfere with the wife's right of dower. The only question that can be asked, at the death of the husband, is, was he seized and possessed of the land? Was the title in him? If so, the wife, by the positive provisions of the statute, is entitled to dower. No lien created by the husband can interfere. In England, and in most of the States, it is held that, if a deed and a mortgage for the purchase-money are executed contemporaneously, no such *seizin* of the land passes to the husband, as makes the wife endowable. See 1 Scribner on Dower, and the cases cited. But it will be found that these cases all turn on the well settled rule, that, at law, a mortgage is a title—that the *seizin* is in the mortgagee—and it follows that, as the *seizin* of the husband is only *transitory* in the case put, the right of dower does not attach. It is admitted, that if the title be in the husband, but for a day, the *seizin* is complete, and the right of dower attaches.

The English cases turn wholly upon the technical legal proposition that a mortgage is a title and not, at law, a mere lien. Our Code, section 1944, declares expressly the contrary. It says a mortgage in this State is only a lien, and conveys *no title*. The argument is irresistible that, as a mortgage, in Georgia, conveys no title, the English doctrine that the right of dower does not attach because the *seizin* of the husband is only transitory, cannot have, in this State, any force. The rule that the wife's dower yields to a mortgage for the purchase-money made contemporaneously with the deed, dependent, as it is, solely upon the technical rule that a mortgage is a title, wholly fails in this State when, by the express statute, this character of a mortgage is directly repudiated, and the contrary declared to be the law. Some of the American cases deny the right of dower, not only on the idea that the mortgage is a title, but upon the further ground that there is an equity in favor of the vendor which overrides the right of the wife. (Though, in this State, the vendor's lien is abolished. Code, 1978.) Indeed, it would seem that

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the Courts have felt that the mere technical idea of a mortgage being a title was an unsatisfactory ground to put it upon. And they have, many of them, made it turn upon the idea that the mortgage being for the purchase-money, the vendee took the land with the incumbrance upon it. These cases recognise the right of the wife to dower, but they declare the dower subject to the mortgage, as it would be to any other lien upon it lawfully when the husband got his title. This is, without doubt, a more satisfactory ground to rest upon than the English idea of a want of *seizin* in the husband; since, *in fact*, even in England, a mortgage is not a title, whatever it may be in theory. But, our Code will not allow us even to deny the dower on this idea. True, the mortgage is a lien, which went upon the land at the moment the title was acquired, and in a very true sense it may be said that the husband took the land with the lien upon it. For this reason, our Court, in *Scott, Carhart & Company vs. Warren & Spicer*, 21 Georgia, 408, decided that a mortgage for the purchase-money, executed contemporaneously with the deed, had a preference to judgments then existing against the vendee. And, were there nothing in our law on the subject of dower, except the simple statement that the wife is entitled to dower in all lands of which her husband died seized, we should be inclined to hold that the wife took subject to the mortgage, as she would to any other incumbrance on the land existing at the time the title of the husband accrued. But section 1759 of the Code provides that *no lien* created by the husband shall in any manner interfere with the dower. Was this mortgage lien created by the husband? Without doubt it was. How, then, can we give it, in any manner, preference to the dower? What right have we to add an exception to the statute; especially when it contains such positive language, how can we give a preference? If we say that the husband may, by creating a lien for the purchase-money contemporaneously with the deed, do we not, at least, in one case, allow a lien created by the husband in some manner to interfere with the wife's right of dower?

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If men will be careless enough to *convey title* to lands, with the purchase-money unpaid, they take the risk, not only having the land sold, but in Georgia, they have no lien, and even if they take a lien in writing, they stand, as do other persons who take liens: they yield to the wife's right of dower. We do not think the definition of "dower," in the Code, was intended to change the rights of the parties. By the words, "seized and possessed," is simply meant, "has the title." Any other construction would deprive the wife of dower in wild lands. The title to these lands was, at his death, in Slaughter, and his *mere* obligation to another to make a title, on certain conditions which have not been performed, does not, in our opinion, alter the wife's right. What equitable rights might arise in a case where a portion of the condition was performed, we do not decide, as there is no such fact in this case.

Judgment reversed.

WARNER, Judge, concurred, but delivered no opinion.

LOCHRANE, Chief Justice, dissenting.

In the discussion of the legal question presented by the record, I shall confine myself to the sole proposition, whether *dower*, under our law, attaches to property, the deed to which, and mortgage back to secure the purchase-money, was one transaction. Code, section 1753, provides: "Dower is the right of the wife to an estate for life, in one-third of the lands, etc., of which the husband died seized and possessed." The argument is, that the right of dower attaches over every lien created by the husband, and, inasmuch as he was *seized* of the fee to the lands in question, and under our law, Code, section 1944, "a mortgage in this State is only a security for a debt, and passes no title," that the wife is entitled to her *dower*; for the mortgage was only a lien created by the husband, and though it was executed at the time of the deed, and for the purpose of securing the purchase-money, still

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holds no higher *status* than a lien. And under the Code, section 1759, which is as follows: "No lien created by the husband in his lifetime," etc., "shall, in any manner, interfere with her right to dower," it is held that the mortgage for the purchase-money shall not interfere, but is subordinate to the legal estate of dower of the wife therein.

I am constrained to differ with the judgment of the Court upon this question, and at the outset remark, that, in my judgment, the naked declarations of the Code must not be literally construed, but taken with their history in the light of previous legislation and adjudication upon the subject-matter. And this mode of construction is not only reasonable and proper, but is supported by the decisions of this Court. In the case of *Phillips vs. Morrison & Solomon*, January Term, 1871, in construing the section of the Code releasing sureties, (section 2121,) this Court held the meaning of the Code to apply to principles of justice drawn from the common law, and adjudication of Courts thereon. Now, in construing the section, 1753, giving the right of dower, why shall we not apply to it the principle decided by this Court, in 21 Georgia Reports, 408, as to the effect of transitory *seizin* in the purchaser, who, at the same instant, encumbers, by mortgage for the purchase-money, the lands? It will be remembered, that when this decision was delivered, a mortgage in this State created only a lien, and not an estate, in the thing mortgaged. Judge Lumpkin says: "The bargainer sells the land to the bargainee, on condition that he pays the price at the stipulated time, and whether this contract, *which is one*, is contained in the same instrument as it well may be, or in distinct instruments executed at the same time, can make no possible difference. Taking the whole transaction together, it is a conditional sale, and the title never did vest in the mortgagor, except encumbered with the debt, to-wit: the purchase-money." "Suppose that Wade, after receiving the deed from Barnes, had refused to execute the mortgage, could not the contract have been re-

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scinded? Unquestionably. Then it took both the instruments to consummate the agreement. It is like a feoffment and defeasance at common law, which is deemed but one conveyance: 2 Bla. Com., 327; Co. Lit., 236, *b*. Where two instruments are executed at the same time, between the same parties, relative to the same subject-matter, they are to be taken in connection, as forming together the several parts of one agreement: 1 John. Cas., 95. Where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase-money, at the same time executes a deed, the deed and mortgage are to be considered as part of the same contract, as taking effect at the same instant, and as constituting but one act, in the same manner as a deed of defeasance forms, with the principal deed, to which it refers, but one contract, although it be by a distinct and separate instrument: *Holbrook vs. Finney*, 4 Massachusetts Reports, 569."

The decision of the Court was not predicated upon the common law, but upon the nature of the transaction; for a mortgage was only then, as it is now, a security for a debt, and passed no title to the land. And we find the same principle sustained by nearly all the American cases. In *Maybury vs. Bryan et al.*, this question was before the Court, Judge McLean delivering the opinion. In that case the mortgage was delivered at the same instant with the delivery of the deed, and it was held that, upon such a *seizin*, dower did not attach. The doctrine recognized is to the effect, where a man has the *seizin* of an estate beneficially for his own use, the widow should be endowed, but where a mortgage is given by the grantee at the same time with the conveyance there is no such beneficial *seizin* in him as will give the right to dower. The same doctrine may be found in *Cunningham vs. Knight*, 1 Barbour, 399, where it is held that an instantaneous *seizin* by the husband is not sufficient for a right of dower to attach in the wife; as where the husband takes a conveyance of land, and at the same time gives

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back a mortgage to secure the purchase-money. In *Gammon vs. Freeman*, 1 Redfield, 243, we find the same principle; in *Boynton vs. Sawyer*, 25 Alabama, 497, the principle is laid down, "when the husband purchases and mortgages for the price the mortgage overrides dower."

This principle we find recognized as the doctrine of the various States, and it stands without an exception. If it be said that these decisions follow the common law, then, under the doctrine applicable to the rights of the wife to dower in the lands in which her husband was seized during the coverture, the transitory *seizin* by which, in the first instance, the party was invested could not be, by his own act, without his wife uniting therein, divested to the exclusion of her rights of dower. If the rule under the law where she had to unite with her husband in the relinquishment of her dower prevented the transitory *seizin*, in such a case from vesting her with a dowable interest, why should such *seizin* under contract of incumbrance, by which contract the estate itself was procured, be held to be dowable? The same reason would apply in both cases. I am not unaware of the great liberality with which Courts have been disposed to treat applications for dower, and the principle laid down by the Master of the Rolls that it is not only a legal but a moral right that she should have sustenance out of the estate of her husband. And the policy of the law has been founded upon this acknowledged right. But is it justice, or equity founded either upon legal or moral considerations, that the property of another party, who may have children of his own, shall be taken for the support and maintenance of another man's wife? Was it the intention of the Code of Georgia so to change the policy of the law and its acknowledged justice and equity as to appropriate the property which, at the time of the purchase and by the terms of the purchase, was incumbered with a debt due for the purchase-money, and which, by the decision of this Court in 21 Georgia Reports, became virtually a conditional sale; that is to say, a sale in-

cumbered with a condition for the payment of the purchase-money? The liens which dower displaces are liens created by the husband. But this, taking the deed and conveyance of mortgage together, is not a lien, but something higher. It is not a thing growing out of the contract, but it is the contract itself, and to dissever it and mutilate it is to rescind the whole agreement and set it aside. Suppose A and B were to exchange deeds to land at common law, by so strict a construction, except their wives united in relinquishment they would be entitled to dower, both of them in both estates. But there was a principle that the common law attached, by which a condition was implied prohibiting the enjoyment of dower in both estates. And in the case at bar, in the purchase of this estate, there was a condition expressed at the time of the contract, and as a part of the contract, that the purchase-money should be paid and the property stand pledged until it was paid. The lien enacted by the husband contemplated by the statutes means the lien created upon something which belonged to the party creating it, and not something by which the estate itself was obtained.

In the language of Judge Lumpkin, the title never did vest "except incumbered with the debt. When a man purchases land from another, and one of the terms of the purchase is that the land shall be a security for the payment of the purchase-money, all that comes to belong to the purchaser is such an interest in the land as is consistent with the liability in the land to be sold for the payment of the purchase-money." The rights under the mortgage and the deed vested *simultaneously*, and it was just as necessary to render the deed good that the mortgage should have been made as it was to make the mortgage good that the deed should have been made. The contract of sale was inchoate until both were perfected, and the interest the purchaser obtained was an interest upon condition, and could neither be diminished nor enlarged by the fact of his death. Nor can the widow claim any greater estate vested in her husband than he himself acquired under the terms of his contract.

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THOMAS G. BRYAN, plaintiff in error, *vs.* THE STATE, defendant in error.

1. An indictment is sufficiently technical, under section 4428, of the Code, that charges, that the defendant, in the year 1870, did unlawfully employ the servant of one Phillip West, during the term for which he was employed, and that he was then in the employment of West, and that his term of service was not expired.
 2. Where the Court let in testimony of a previous employment by the defendant, though before the end of the year, and not in writing, it was error in the Court to charge the jury that such previous contract was no protection or justification, inasmuch as that question was one for the jury, under the facts.
 3. Where the evidence showed the person employed by the defendant had been previously employed by the prosecutor, to bring other hands with him to his plantation and superintend them :
- Held*, That such employment did not constitute such person a servant, within the provisions of the law. See concurring opinions.

Criminal Law. Servants. Before Judge CLARK. Lee Superior Court. February, 1871.

The indictment charged Bryan with a misdemeanor, "for that the said Thomas Bryan, in the county and State aforesaid, on the third day of January, in the year eighteen hundred and seventy, did then and there unlawfully employ Mitchell Daniel, colored, the servant of one Philip West, during the term for which he was employed, the said Thomas Bryan knowing, then and there, that the said servant, Mitchell Daniel, colored, was then in the employment of said Philip West, and that his term of service had not expired, contrary," etc. When the jury was empaneled and sworn, the defendant's counsel demurred to said indictment, because the offense was not sufficiently stated to authorize conviction. The demurrer was overruled. West then testified, that on the 1st of January, 1870, he made a contract with said negro, by which he hired the negro for 1870; the negro was to furnish hands and "boss" or superintend them, and was to move on his place and commence work on Monday, the 3d of January,

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1870. But the negro did not come, though West sent for him to one Harris', where he had worked during 1869.

Harris testified, that on the 3d of January, 1870, he saw Bryan and the negro together, and told Bryan that West had hired the negro for 1870. Bryan said he could not help that, and he or the negro said, that the negro had promised Bryan in "ground-pea-time," in 1869, to live with him during 1870, if Bryan got a place. The negro remained with Bryan during 1870. Another witness heard Bryan say to the negro, on 2d of January, 1870, that his, Bryan's, offer was better than West's. For the defendant, the negro testified that, in 1869, in June, his mule died, and he called on Bryan, his former master, for help, got it, and agreed to live with him during 1870, if he got a place, Bryan agreeing to pay him. This contract was fixed on definite terms, on the 2d of January 1870. He had contracted with West on the day before, to get squad of hands, oversee, etc., for \$150 00 cash, and one-third and one-fourth of crops. He did not carry out West's contract, because hands could not be had, having generally hired themselves out. And he did not know Bryan had a place till the 2d of January, 1870. Bryan told Harris, in said conversation of 3d of January, 1870, that rather than have any bad feeling, he would give him up, though he had hired him, long before, for 1870.

Defendant's counsel requested the Court to charge the jury, that "if this negro, in June, 1869, agreed to live with and work for defendant, for 1870, and the subsequent agreement under which the negro entered upon and served defendant for 1870, was made in good faith and in consequence of the first agreement, with no intention to interfere with West's contract, or to violate the law, defendant was not guilty." He refused so to charge, but charged the jury that, "when and as soon as one employed another to serve him, for a time, to commence at a day, then such person employed, was, in contemplation of law, the servant of the person so contracting for his services, although the employee had not,

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in fact, entered into the actual service of or labor for the person so employing him; and if defendant employed Daniel after West had so contracted for his services, for the year 1870, and during that year, and before he had gone into the actual service of and labor for West, under that contract, defendant was guilty, if he contracted with knowledge of West's contract." The defendant was found guilty. A new trial was moved for, upon the grounds that the verdict was contrary to law and evidence, and that the Court erred in refusing to sustain said demurrer, and to charge as requested, and in charging as aforesaid. The new trial was refused, and that is assigned as error.

LYON, DEGRAFFENRIED & IRVIN; W. A. HAWKINS,
for plaintiff in error.

B. P. HOLLIS, Solicitor General, for the State.

LOCHRANE, Chief Justice.

1. This was an indictment under section 4428 of the Code. The first ground of error is to the judgment of the Court in overruling the demurrer to the indictment. The indictment charges that Thomas Bryan, in the year 1870, did unlawfully employ the servant of one Philip West during the term for which he was employed; that the servant was then in the employment of West, and that his term of service was not expired. In the opinion we entertain of this question we are satisfied that the offense is sufficiently averred. It is charged in the language of the Code. And, while the pleader might have made it more distinct by stating what the term was for which the employment was made rather than use the words "during the term," still we think that the allegation of the date of such employment, together with the further allegation that he was then in the employment of the party, and that his term of service had not expired, was a sufficient compliance with section 4535 of the

Code. This construction of that statute is essential to the administration of justice, as long as the statute itself remains the law of this State. For when the law declares every indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury, to exact, by construction, a different rule of pleading would in effect be a virtual repealment of the provision. We, therefore, think the Court was right in overruling the demurrer to the indictment.

2. Upon the testimony submitted in this case the prisoner was convicted, and a motion was made for a new trial upon several grounds, which we will notice in their order. The ground of the second error is in the charge of the Court that, as soon as one had employed another to serve him for a term to commence at a day thereafter, the person employed was, in contemplation of law, the servant of the person contracting for his services, although he had not, in fact, entered on the actual service of the employer. At common law, we find the definition of servants to embrace, first, menial servants; second, apprentices; third, laborers; and fourth, stewards, factors and bailiffs. As to how far the relative rights and duties of these relations at common law are applicable to our condition, or are of force in this State, we will not now discuss. To say the least, the most of the correlative duties springing out of these relationships have gone into disuse, and ceased to be applicable practically to our condition. It is not the theory, nor is it consistent with the spirit of our institutions, to recognize factors, stewards or bailiffs in the light of servants as at common law. The terms and the indentments of the service required, under our institutions, are incompatible. Nor do we believe that a citizen of this State, under the franchises and immunities with which the law invests him, who may contract for labor either as a mechanic or on a plantation, is so stripped of his individuality and

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personal independence as to constitute him a servant in the sense of the common law. Nor do we, in this opinion, design to dignify such persons beyond the proper reach and regulations of the law. We have no sympathy with the cant that elevates, by adulation and flattery, this class of people in this State beyond their legitimate station. The prosperity of the State depends upon a well organized system of labor; and the Legislature may provide by appropriate penalties for the breach of contracts, and force by its processes strict compliance therewith. They may go farther in the enforcement of Acts for the punishment of idleness, and compel obedience to their legislative mandates. The law which gives a right of action under the laws of force in this State against the master for the act of his servant, confines such right of action to acts done while he is actually employed in the master's service. And this principle would not apply to cases where the servant was only under contract, for in such case no right of action would accrue for acts done before he went into his service. The law under consideration makes that which was a cause of action for damages at common law a crime under the provisions of our Code. The right of an action for damages against a person hiring the servant of another while in his service, by which the servant leaves the one and goes to the other, is "founded," says Blackstone, "in the property that every man has in the service of his domestics acquired by the contract of hiring and purchased by giving him wages." While, at common law, the master is not liable for the act of his servant, except in his actual employment, nor even then except the act of the servant grows out of such employment, still his right in the premises grows out of the contract of hiring, and the common law presumes him in the service; for the language is, "If any person do hire or retain my servant being in my service, for which the servant departed from me and goeth to serve the other;" thus recognizing a right acquired by the contract, in the loss of the service. And the Legislature of 1866, looking to the de-

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rangement of an entire system of labor, and warranted by the facts growing out of the circumstances in which the colored element was wholly irresponsible for any breach of contract, and consequently regardless of it, and the failure of all law to enforce such contracts, or provide any remedy or redress for such wrongs, and appreciating the great public necessity of punishing employers whose acts contributed to the violation of such contracts, enacted this salutary law, which we hold, first, it was within their constitutional power to do; and we therefore think the view of the law presented by the Court was proper. The evidence in this case showed that Mitchell Daniel was originally the slave of the plaintiff in error; that he was working with Nathaniel Harris in 1869, and during that year lost his mule, when he came to Bryan, who furnished him with one, and at that time agreed to live with him during the year 1870. The evidence is further that West, the prosecutor, employed him on the 1st day of January, 1870. He was "to furnish other hands," and "superintend as boss or superintendent." Then, on the 3d day of January, he came to Bryan, who held him during the year. On this statement of facts, the Court charged the jury that this contract was no justification, and could not justify or protect him from a conviction. In this, we think, the Court committed error. The questions of fact in this case were for the consideration of the jury; and whether this agreement to live with Bryan for the year 1870, under the facts, was such a contract as the Court could or could not enforce, because it was not in writing was not the question in the criminal prosecution in this case. It was competent to go to the jury to illustrate the intent and motive of the parties, and might, by its subsequent ratification, on the 3d of January, 1870, have constituted a valid contract; and the matter ought to have been left to the consideration of the jury to give it such weight as they, in their judgment, might deem it entitled to.

3. Again we hold, from the testimony in this case, that

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Mitchell Daniel was not employed as a servant, but as a superintendent of servants, if laborers may be so classed; and his employment under the facts in this case, by Bryan, would not render him obnoxious to the provisions of the Code. The law only specifies "the servant of another," and we can not enlarge the Act by construction. If he was not the servant of West, then though in his employment by contract, the law did not authorize a conviction for crime on the part of Bryan, for the breach of contract upon the part of the negro, Daniel. The terms of the law must be construed with regard to the intent of the law, and the intent was to punish, not for breaches of contract, but the employment of the servants of another, during the term of such service. And while we may hold that the term of service begins with the contract for service, before it is actually entered on, as the language of the Act is directed against *the employment* of the servant of another; still, we do not think the construction of the law will include any except servants. And we, therefore, think the Court erred in holding one who was employed to superintend others, where there is no proof he was to work himself, as a servant, within the meaning of the Code.

Judgment reversed.

McCAY, Judge, concurring.

A contract that one should furnish a lot of hands to work a crop, he and they to receive one-third of the corn and one-fourth of the cotton, the contractor to superintend and oversee the hands, and to get \$150 00 extra, is not a contract of *service*, under section 4428 of the Revised Code.

WARNER, Judge, concurring.

The demurrer to the indictment was properly overruled. The offense was stated in the terms and language of the Code, and so plainly, that the nature of the offense charged might have been easily understood by the jury. The 4428th

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section of the Code declares, that "If any person, by himself or agent, shall be guilty of *employing* the servant of another, during the term for which he, she or they may be employed, *knowing* that such servant was so employed, and that his term of service was not expired, or if any person or persons, shall entice, persuade or decoy, or *attempt* to entice, persuade or decoy, any servant to leave his employer, either by offering higher wages, or in any other way whatever, during the term of service, *knowing* that said servant was so employed, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished," etc. This section of the Code contemplates two classes of offenses. First, the *employing* the servant of another, during the term for which he, she or they may be employed, *knowing* that such servant was so employed, and that his term of service was not expired. Second, enticing, persuading, decoying, or *attempting* to entice, persuade or decoy, any servant to leave his employer, *knowing* said servant was so employed. There are three classes of servants recognized by the common law: First, menial servants; second, apprentices; third, laborers. The general definition of servants, as mentioned in the Code, is sufficiently comprehensive to embrace all three classes of servants, as defined by the common law. When one man has employed a servant to work for him for a definite period of time, and another man, *knowing* of such employment, employs that same servant for and during any period of the time for which the first employed him, he is guilty of the offense of *employing the servant of another*, within the true intent and meaning of the law. The object and intention of the law, was to make it a punishable offense for one man to interfere with *the contracts* of another, or the employment of servants, having *knowledge* of such employment. If A has employed a servant by contract, to work for him a specified period of time, and B, with *knowledge* of such contract of employment by A, afterwards employs that servant, for any period of the time embraced within A's contract of employment, the of-

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fense is complete, under the law, whether the servant has actually entered into the service of his employer or not. The law was intended to prohibit any interference with *contracts* for the employment of servants, *knowing* that they were employed. If the servant has entered into the service of his employer, and another attempts *then* to employ him, or does employ him, such person is liable to be indicted for enticing, persuading or decoying such servant from the service of his employer, *knowing* such servant to be employed. Interfering with *contracts* for the employment of servants, *knowing* them to be employed, is one thing. Inducing servants to leave their employers after they have entered upon their term of service, *knowing* them to be employed, is another thing; and either is an indictable offense under the law. I concur in the judgment of reversal in this case, on the ground that the Court below erred in its charge to the jury, in relation to the contract made with the defendant and Mitchell Daniel, prior to the contract made with West. That contract should have been left to the consideration of the jury, for the purpose of showing a want of any *criminal intent* on the part of the defendant to violate the law. The charge of the Court excluded from the consideration of the jury, the criminal intent of the defendant. In view of that prior contract, they might or might not have considered it sufficient to rebut the presumption of any *criminal intention* on the part of the defendant, to violate the public law of the State, and they should have been left free to consider the evidence in relation to that point in the case.

T. B. MYERS, sheriff, plaintiff in error, vs. D. H. WILCOX,
defendant in error.

Where a judgment was obtained in Schley county, on the 25th of October, 1870, on a debt contracted before the first of June, 1865, upon which an execution issued, and the sheriff failed to raise the money on

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the same, on receiving from the defendant an affidavit that the taxes due thereon had not been paid, together with a claim of an offset and reconpment, in favor of the defendant, according to the Act of October 13th, 1870, which affidavit set forth that said debt had not been reduced, according to the equities between the parties, under the Relief Act of 1868:

Held, It was error in the Court to hold the sheriff liable, on a rule for the amount of the judgment—the proper construction of the Act of October 13th, 1870, being at the time, unsettled and doubtful, and the sheriff having apparently acted in good faith.

Rule against Sheriff. Relief Act of 1870. Before Judge CLARK. Schley Superior Court. April Term, 1871.

Wilcox sued Eason on his promissory note, made in March, 1860, and had judgment on the 25th of October, 1870. *Fi. fa.* was issued in February, 1871, and levied in April, 1871. Eason made affidavit that said *fi. fa.* was proceeding illegally, because no affidavit of the payment of taxes, as required by the Relief Act of 13th of October, 1870, was attached to the *fi. fa.* before the levy was made; that when said contract was made, prior to June, 1865, Eason owned slaves worth \$3,297 00, which were lost by the result of the late war, and without his fault, and he claims “the right to set-off against said *fi. fa.* said loss according to said Act; said credit was not pleaded or allowed on the original trial, and he believed the taxes required by law had not been paid on said debt.” Upon receipt of this affidavit, the sheriff refused to sell the property, though urged to do so by plaintiff’s attorney, he insisting that, especially as this judgment was after said Act, defendant’s affidavit should be disregarded.

The sheriff was ruled. He made no other excuse for not making the money, except that said affidavit stopped him. This showing was demurred to, and the rule was made absolute. That is assigned as error.

C. F. CRISP; C. T. GOODE, for plaintiff in error.

J. A. ANSLEY; S. H. HAWKINS; W. D. KIDDOO, for the defendant, cited 40 Ga. R., 506, 493.

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If the judgment against the defendant in *fi. fa.* had been obtained previously to the 13th of October, 1870, the affidavit taken by him would not only have justified, but compelled the sheriff to stay proceedings. The judgment was, however, in fact, obtained on the 25th of October, 1870, twelve days after the passage of the Act of the 13th of that month. Ordinarily, it is a fair presumption that, in obtaining a judgment, the law of the land in reference to it will be complied with. The Courts, as well as the parties, are presumed to know the law, and to apply it. The question, then, in this case is, whether the sheriff is guilty of a contempt of the process of the Court in staying proceedings under the affidavit filed by the defendant, that this was a debt due before the 1st of June, 1865, and that the taxes due thereon had not been paid. The argument is that, as this must, under the Act of October 13th, have been shown before the plaintiff could, under the law, get his judgment, the sheriff was not justified in taking an affidavit denying it. Ordinarily, this is not the proper rule. But what are the facts here? The county of Schley is, by the ordinary line of travel, at least two hundred miles from the capital. This judgment was had on the 25th of October, just twelve days after the signing of the Act of October 13th by the Governor. Section 13th of the Code provides "that laws should not be obligatory upon the inhabitants until published in some public gazette, and three days shall be allowed from the date of publication for every hundred miles distance from the capital before a knowledge of the law shall be presumed against the inhabitants." Under this section the Act of October 13th became obligatory in Schley county on the 20th day of October, 1870, provided it was published in a public gazette on the very day it was signed. We are not aware of any law providing a specific time within which laws shall be published. In the absence of such law, it is fair to presume that this will be done within a reasonable

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time, since we must always, *prima facie*, assume that public officers have done their duty. We doubt much if six days is not within a reasonable time, and we incline to think it would be pretty violent to presume publication in a less time than that. Under this rule, it is not clear that the Act of October 13th was obligatory in Schley county on the 25th of October. At any rate, it is a harsh construction to hold the sheriff liable for contempt on such a presumption, especially as no harm has come to the parties but delay. Ordinarily, the sheriff acts at his peril, but when the case is a matter for serious doubt we do not think the sheriff guilty of *contempt* if he act in good faith.

Judgment reversed.

LOCHRANE, Chief Justice, concurred, and WARNER, Judge, dissented, but neither furnished any opinion.

FANNY E. LUMPKIN *et al.*, plaintiffs in error, *vs.* W.
THOMAS EASON, defendant in error.

Where a homestead was claimed under the Act of 1868, by the wife of a husband, on his land, who had been adjudged a bankrupt:

Held, That the wife could not have a homestead on the land of her bankrupt husband, as against the assignee of the bankrupt, or those claiming title thereto under a sale made by the assignee of the bankrupt.

Ejectment. Homestead. Bankruptcy. Before Judge CLARK. Schley Superior Court. April Term, 1871.

This was ejectment by Mrs. Lumpkin and her children, against Eason. Their title was a record, showing that, on the 12th of December, 1868, the premises in dispute had been, by the Ordinary, duly set apart to them as their homestead. Defendant's title was based upon the following facts: On the 20th of May, 1868, creditors of Lumpkin, husband

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of Mrs. Lumpkin, and father of said children, petitioned to have him declared a bankrupt, and that his estate be taken possession of for their benefit. On the 23d of May, the Judge of the United States District Court, issued his order, as prayed for, to take effect upon petitioners giving a certain bond. This they did on the 10th of June, 1868. On the 16th of June, Lumpkin answered, denying the acts of bankruptcy charged. There having been an order for Lumpkin to produce his books, etc., and he having refused, and a proceeding being had to punish him for contempt, on the 7th of November, 1868, he agreed, in writing, to withdraw all objection and allow himself to be adjudged a bankrupt. On the 9th of November, 1868, he was adjudged a bankrupt, and on the 28th of November, the Register in Bankruptcy appointed a temporary assignee for Lumpkin, to take and dispose of his property according to law. On the first Tuesday in January, 1869, this temporary assignee sold the premises, after due advertisement, etc., and Crawford bid it off. Afterwards, a regular assignee was appointed, and took from the Register a conveyance of all of Lumpkin's estate, owned on the 20th of May, 1868. In February, 1869, Hollis obtained from the Register an order allowing him to sell said land privately to Crawford, and he did so sell it at the price for which Crawford had bid it off. In March, 1869, Crawford sold and conveyed the land to Eason. It was shown that there was an allowance of land to Lumpkin under the bankrupt proceeding, but Lumpkin testified that this was done without his knowledge or consent. And they offered to prove by Lumpkin, that the consent to allow himself to be adjudged a bankrupt, was procured by fraud, but the Court would not permit it. It appeared that when the temporary assignee was selling the land, notice was given to Crawford and Eason, of said setting apart of the homestead therein; that because of this, Crawford refused to comply with his bid, and would not, nor did pay it, till he got the deed from the regular assignee.

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These facts being proven, plaintiffs' counsel requested the Court to charge the jury: 1st. That Lumpkin's consent with his creditors could not defeat the right of his wife and children to a homestead and exemption, under the laws of this State. 2d. That the assignee succeeded only to Lumpkin's rights in his property, to the extent Lumpkin had it, subject to all equities and encumbrances existing against them in Lumpkin's hands, and the same rule applies to the purchaser at the assignee's sale. 3d. The purchaser took only the right which Lumpkin had at the time of the sale. 4th. That this property having been regularly set apart as the homestead of plaintiffs, and the purchaser having actual notice thereof, he purchased subject to the rights of the plaintiffs. 5th. If plaintiffs were in possession of the premises, under said setting apart of homestead, and defendant ousted them under the deeds from the assignee of Lumpkin to Crawford, and from Crawford to himself, plaintiffs must recover, unless this sale by the regular assignee was made under an order of the Judge of the District Court; and if the Register allowed such sale for a stipulated sum, privately, such sale to Crawford was void, and Eason's possession is wrongful. 6th. That, if Lumpkin had sold the land to Crawford, and before he paid for it, Crawford was notified by Lumpkin's wife that she intended applying for a homestead therein, he would take the land subject to her right of homestead, and he occupies the same position, having bought from the assignee after such notice. 7th. The deed from the Register to the assignee restored the title of all of Lumpkin's property, and the assignee took it as Lumpkin held it, and could not sell it so as to pass the title, except by selling it according to law. 8th. If Crawford knew, when he paid the money, that Mrs. Lumpkin had a homestead on this land, he got no title against her claim of homestead.

The Court refused so to charge, but charged that, if Lumpkin was, on the 9th of November, 1868, adjudged a bankrupt according to law, he ceased to have any control over his prop-

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erty, that the title, by operation of law, passed to the assignee from the date of the petition. And if Crawford bought from the assignee and sold to Eason, Eason got a good title as against this claim of homestead. Any irregularity in Eason's title may be objected to by creditors, etc., but is of no avail to Lumpkin's wife and children.

The jury found for the defendant. Plaintiffs moved for a new trial upon the grounds that the Court erred in refusing to charge as requested, in charging as he did, and in not allowing proof that said consent to put Lumpkin into bankruptcy was procured by fraud. The Court refused a new trial, and that is assigned as error.

HAWKINS & BUBKE; P. COOK; M. H. BLANFORD; N. A. SMITH and C. B. HUDSON, for plaintiffs in error, supported their requests as follows: The first: 39 Ga. R., 425; Kelly *vs.* Stephens, 39 Ga. R.; Hodo *vs.* Johnson & Heath, 40 Ga. R. The second: 2 Story, 334; 2 Saund., 494; Bankrupt Act, secs. 14, 15, 43; 5 Gill, 346; 3 B. R., 181; 9 Am. L. R., 349; 5 L. R. 507. The third: Bankrupt Act, sec. 43; 17 Sheph., 121; 2 Story, 360, 630. The fourth: 3 Wheat., 234; 16 Am. L. R., 100; B. R., 36. The fifth: Bankrupt Act, secs. 13, 14, 15; 1 B. R., 19. The sixth, seventh and eighth: 40 Ga. R., 294, 297.

C. T. GOODE; HAWKINS & GUERRY, for defendants.

WARNER, Judge.

This was an action of complaint, instituted by Mrs. Fannie E. Lumpkin and her children against the defendant, to recover the possession of a tract of land. The record discloses the following facts: On the 9th day of November, 1868, John T. Lumpkin, the husband and father of the plaintiffs, was adjudged a bankrupt, and on the 28th of November, 1868, an order was granted appointing assignees to take charge of the property of the bankrupt, and dispose of it in accordance

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with the terms of the Bankrupt Act of Congress. The land was sold by the assignees of the bankrupt, purchased by Crawford, in the manner and under the circumstances set forth in the record, who conveyed it to the defendant. On the 12th of December, 1868, the land in dispute was set apart by the Ordinary of Schley county as a homestead to Mrs. Lumpkin and her children out of the land of her husband, who was then a declared bankrupt, and this is the foundation of her title to the land. Under the provisions of the 14th section of the Bankrupt Act of 1867, all the property of the bankrupt, both real and personal, vested in the assignee from the time of the commencement of the proceedings in the Bankrupt Court, except such property as is specified in the Bankrupt Act, and such other property as was exempted from levy and sale by the laws of this State in the year 1864. The question in the case is, whether the plaintiffs, under the provisions of the Homestead Act of 1868, acquired any title to the land set apart to them for a homestead, as against the title of the assignee of the bankrupt and those claiming under the sale made by such assignee? Although the sale made by the assignee of the land may have been irregular and void, still if the title thereto was vested in the assignee of the bankrupt from the time he was declared a bankrupt, the plaintiffs acquired no title to the land under the Homestead Act, which would have authorized them to recover it from the possession of the defendant. On the trial of the case, the jury, under the charge of the Court, found a verdict for the defendant, to which charge, and refusal to charge as requested, the plaintiffs excepted. On the statement of facts disclosed by the record there was no error in the charge of the Court to the jury, or in the refusal to charge as requested, that the setting apart of the homestead to the plaintiff out of her husband's property, *after he was adjudged a bankrupt*, conferred no title upon her to that property, or *lien upon it as against the assignee of the bankrupt and those claiming under such assignee.* If the sale of the land by the

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assignee was irregular and void, still, the title thereto would be in the assignee and not in the plaintiff, and she could not recover the land from the possession of the defendant, though he may not have had a good title.

Judgment affirmed.

McCAY, Judge, concurring.

The rights of a wife and children to a homestead provision out of the property of the husband is not such a lien upon the same as follows the property into the hands of a third person acquiring title before any application is made to the Ordinary to set the same apart, and if the husband be declared a bankrupt before homestead is set aside the rights of the wife is matter for the adjudication of the Bankrupt Court, and the State Courts have no jurisdiction over the same.

NANCY BIGBY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

When an indictment charged and accused an unmarried woman with the offense of "fornication," for that she had sexual intercourse with a married man :

Held, That the indictment was bad, on special demurrer thereto, that the offense should have been charged as "adultery and fornication," in the language of the Code defining the offense. McCAY, Judge, dissenting.

Criminal pleading. Before Judge HARRELL. Randolph Superior Court. May Term, 1871.

The indictment charged Nancy Bigby "with the offense of fornication. For that the said Miss Nancy Bigby, an unmarried woman, on the 11th day of February, in the year 1871, in the county aforesaid, did then and there unlawfully and with force and arms, cohabit and have sexual intercourse

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with one James A. Foster, then and there being lawfully married to another woman," contrary, etc. This indictment was demurred to, because the facts charged against her make adultery and fornication, and not fornication. The Court overruled the demurrer. She was convicted. There was a motion for a new trial, upon the grounds that the Court erred in overruling said demurrer. The Court refused a new trial, and error is alleged on said ground.

DOUGLASS & CHASTAIN; WOOTTEN & HOYLE; R. F. LYON, for plaintiff in error, relied on 18 Ga. R., 264.

J. H. TAYLOR, Solicitor General, *pro tem.*; B. S. WORRILL, for the State, cited R. Code, secs. 4555, 4460; 11 Ga. R., 53, 225; 24th, 191; 17th, 130; 26th, 614; 3 Kelly, (Ga. R.,) 418; Bouv. Dic., 81, 591; 1 Yeates R., 6; 2 Dallas R., 124. The name of offense is not material: 3 Kelly, 21; 31 Ga. R., 206.

WARNER, Judge.

The defendant was indicted for the offense of fornication. It is alleged in the indictment, that "said Nancy Bigby, an unmarried woman, on the 11th day of February, 1871, in the county aforesaid, did then and there unlawfully and with force and arms, cohabit and have sexual intercourse with one James A. Foster, then and there being lawfully married to another woman, contrary to the laws of said State," etc. There was a demurrer to the indictment, on the ground that an unmarried woman cannot commit fornication with a married man. The Court overruled the demurrer, and the defendant excepted. The 4460th section of the Code declares, n who shall commit adultery or
nd fornication, shall be severally
n of the Code contemplates three
fornication, adultery and fornica-
nd married woman, unlawfully co-

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habit together, they are guilty of the offense of adultery. If an unmarried man and an unmarried woman cohabit together, they are guilty of the offense of fornication. If a married man and unmarried woman cohabit together, they are guilty of the offense of adultery *and* fornication. To constitute the last named offense, one of the parties must be married and the other unmarried. The unlawful cohabitation of a married man and an unmarried woman, is not adultery, nor is it fornication, in the meaning of the Code; but it is adultery *and* fornication, and should be so charged in the indictment. The demurrer to the indictment, which charged the defendant with the offense of fornication, having been made at the time and in the manner as prescribed by the Code, should have been sustained, and the Court below erred in overruling the demurrer to the indictment.

Judgment reversed.

LOCHRANE, Chief Justice, concurred, but furnished no written opinion.

McCAY, Judge, dissenting.

This Court is, I think, committed to the position that the facts set out in this indictment, constitute, under the statute, the offense of "fornication and adultery," and not the offense of fornication. I do not, therefore, put my dissent on the ground that the facts stated do make a case of fornication. My judgment is, that the indictment sets forth all the facts necessary to constitute an offense by the laws of Georgia. It charges that on a certain day, in a certain county, the defendant being then and there an unmarried woman, did have carnal connection with James Foster, a married man. Under section 4458 of the Code, this constitutes a crime, for which the section fixes a penalty. The Code gives no "name" to this offense; it simply says, that any man and woman, who shall commit adultery, or fornication, or adultery and fornication, shall be," etc. It does not

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say that any person doing certain acts shall be guilty of "fornication," etc., but any man and woman who shall commit an act of fornication, etc., shall be punished, etc. Suppose a statute were to say, that any man who shall, unlawfully, beat another, shall be punished, etc? Would not the indictment be good which set forth the time and place and facts of beating, and would it make any difference whether the pleader *called* it a misdemeanor, assault and battery, beating, or what not? I think not. That part of this indictment which charges the defendant with fornication, generally, is merely formal. The pleader might have charged her with a misdemeanor, and any other thing which would be a *general* description of the offense, or he might have left out that part of the indictment altogether. He might have merely said, charge and accuse, that the said did, on ..., and at ..., she being, etc., have carnal connection, etc. The law gives no name to the offense, and it was unnecessary and mere surplusage to name it. The offense consists in the acts charged, and they are left undefined by the Code. I think this indictment conforms to the requirements of section 4535 of the Code. It sets forth the offense charged in the language of the Code, and is sufficient.

THE ORDINARY FOR USE OF E. H. WORRILL, plaintiff in error, vs. HOLLAND ADAMS *et al.*, defendants in error.

Under the provisions of the Act of 1870, requiring taxes to be paid on all debts or contracts made prior to the 1st of June, 1865:

Held, That if the debt was not solvent, or of doubtful solvency, and the plaintiff makes an affidavit to that effect, it is sufficient to enable him to maintain his action in the Courts upon such debt or contract under the provisions of that Act.

Relief Act of 1870. Before Judge HARRALL. Stewart Superior Court. April Term, 1871.

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In December, 1869, the Ordinary of said county, for the use of Worrill, sued Holland Adams *et al.*, and their securities, averring as follows: On the 8th of January, 1865, said defendants made and delivered to said Ordinary their bond, conditioned that said Holland Adams and Charles B. Adams would properly administer the estate of Samuel Adams, deceased. They broke said bond in this: On the 1st of January, 1866, said administrators received, as the assets of Samuel Adams, one hundred and fifty bales of cotton, sold it for \$15,000 00, and on the 9th of November, 1866, they sold other personalty of said intestate for \$5,000 00 cash, and wasted said sums of money by applying the same to their own use, on said days, respectively. On the 1st of September, 1866, Worrill sued said administrators, as such, and on the 25th of April, 1867, had judgment against them for \$1,995 35 principal, \$600 61 interest, and \$16 00 for costs, to be made of intestate's goods in their hands. *Fi. fa.* was issued, and on the 16th of November, 1869, the sheriff returned thereon *nulla bona*. On the 11th of April, 1871, Worrill filed in the Clerk's office an affidavit, in substance as follows: Said intestate owed him a promissory note, given in 1862, for over \$1,900 00, in renewal of a debt originating in 1858; that he, Worrill, had duly paid all legal taxes chargeable by law on said debt, each and every year since the making thereof, i. e., up to 1865, in which year no tax was assessed; in 1866 and 1867, he gave in said debt at what he considered then its market value, to-wit: \$1,000 00, and paid the tax. Since 1867 he paid no tax on it, because he verily believed it had ceased to have any market value, and was no longer a solvent debt; that after the Atlanta Convention and Relief Act of 1868, the debt had no market value, and he considered it insolvent, and did not give it in, because, *bona fide*, and without design to defraud the State, he thought it not taxable. When the cause came up for hearing, said affidavit was demurred to as insufficient, under the Relief Act of 13th October, 1870. The Court held the

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affidavit insufficient, and, under said Act, dismissed said case. This is assigned as error. 1st. Because all taxes due on said paper were paid, as shown by said affidavit; because only solvent debts are taxable, and the creditor is judge of solvency in giving in for taxation. 2d. Because said Act of 13th October, 1870, is unconstitutional and void, and because the Court erred in dismissing said action under said Act.

B. S. WORRILL; E. G. RAIFORD; E. H. WORRILL, for plaintiff in error.

BEALL & TUCKER; M. GILLIS, by H. FIELDER, for defendant.

WARNER, Judge.

This was an action brought by the plaintiff on an administrator's bond, dated 8th of January, 1865, to recover the amount of a debt reduced to judgment, against the intestate, Samuel Adams, alleging that the administrators of Adams had wasted his estate. The original debt on which the judgment was obtained, was contracted in 1858, and was renewed several times. The amount due on it at the time it was reduced to judgment, in April, 1867, was about \$2,600 00. The plaintiff filed his affidavit, under the provisions of the Act of 1870, in which he stated that he had paid all legal taxes chargeable by law on said debt, up to the year 1865, in which year no tax was assessed thereon; that in 1866, and 1867, he gave in said debt at what he believed to be its market value, to-wit: \$1,000 00, and paid the tax thereon; that since 1867, he had not given in and paid tax on the debt, because it was no longer a *solvent* debt, and ceased to have any market value whatever. On motion of defendant's counsel, the Court dismissed the plaintiff's action on the ground that the affidavit of the plaintiff was not a compliance with the requirements of the Act of 1870. Whereupon,

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the plaintiff excepted. If I believed the Act of 13th of October, 1870, to be a valid, constitutional Act, I should hold that the taxes on *all debts* contracted prior to the 1st of June, 1865, or on contracts in renewal thereof, should be regularly given in and paid, on all such debts, whether solvent or not, as a *condition precedent*, to entitle the plaintiff to recover on the same, in the Courts. That such was the clear and manifest *intention* of the Legislature, there can be no doubt. It is entitled "an Act to extend the lien of set-off and recoupment, as against debts contracted before the first day of June, 1865, and to deny to such debts the aid of the Courts, *until the taxes thereon have been paid.*" The third section of the Act declares, that "In suits upon such contracts, in *every case*, the burden of proof showing that the taxes have been duly paid, shall be upon the party plaintiff, without plea by the defendant." The fourth section of the Act declares, that "In *every trial* upon a suit founded upon such debt or contract, as described in this Act: *Provided*, that said debt has been *regularly given in for taxes and the taxes paid*, it shall be a condition precedent to recovery on the same, and in *every such case*, if the tribunal trying is not clearly satisfied that said taxes *have been duly given in and paid*, it shall so find, and said suit shall be dismissed." In view of the condition of the people of the State, and the *status* of this particular class of debts, at the time of the passage of this Act, it can not be reasonably supposed that any member of the Legislature was so *stupid* as to have intended that it should be an Act to increase the *revenue* of the State. The object and intention of the Act, as is *patent* upon its face, was to hinder, obstruct and prevent the collection of all debts contracted prior to the first of June, 1865, and those in renewal thereof; and for the accomplishment of *that purpose*, the aid of the Courts of the State is *denied* to the holders and owners of such debts, unless they shall make affidavit that said debts have been *regularly given in for taxes and the taxes paid*. That, the fourth section of the Act declares, shall be a condi-

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tion precedent to their right to recover on the same. The Act makes *no exception* as to the solvency or insolvency of the debts, but embraces *all suits* founded upon *any debt* made or contracted before the first of June, 1865, or in renewal thereof. The plaintiff in this case, like all other honest taxpayers in the State, did not regularly, each year, give in and pay tax on his debt, because he did not honestly believe it was a *solvent debt* when he gave in his taxable property, under oath; yet, the Act requires him to make an affidavit that this debt has been *regularly* given in for taxes, and the taxes paid on it, as a *condition precedent* to his right to maintain a suit on it in the Courts of the State. Because, as an honest, conscientious tax-payer, he could not swear it was a *solvent* debt when he gave in his taxes, in 1868, 1869 and 1870, and therefore, in the words of the Act, he has not *regularly* given it in for taxes, and *regularly* paid the taxes on it, and, inasmuch as he cannot make the affidavit that he has done so, the Act *outlaws* him from the Courts of the State, as was most clearly the *intention* of the Legislature to do, in regard to that class of contracts specified in the Act. If, in my judgment, this was a valid, constitutional Act, I would affirm the judgment of the Court below in this case. But as I believe it to be an *unconstitutional* and *void* Act, I concur in the judgment of this Court, reversing the judgment of the Court below.

Judgment reversed.

JOHN MCK. GUNN, plaintiff in error, vs. CHARLES F. BARRY, sheriff, defendant in error.

Where a party petitioned the Court for a *mandamus nisi* against the sheriff to compel his levy of a *fi. fa.* placed in his hands upon a homestead of realty set apart under the law, upon the ground that the Act of 1868, so far as it prevented the levy of a *fi. fa.* on such property or a judgment *fi. fa.* in existence before the setting apart of such home-

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stead, and granted a larger amount of exemption than existed under the law at the time of the contract, was unconstitutional and void, and the Court held the act valid, and refused the *mandamus*: *Held*, That this was not error in the Court, under the rulings of the Court affirming the constitutionality of the Act, and protecting the sheriff from rule on account of its provisions from his refusing to levy said *fi. fa.* McCay, Judge, dissenting.

Homestead Act. Retroactive legislation. Before Judge HARRELL. Randolph Superior Court. May Term, 1871.

In 1866, Gunn obtained a judgment against Hart, and *fi. fa.* issued thereon. Under the Homestead Act of 3d of October, 1868, Hart had certain lands set apart as his homestead. Subsequently, Gunn tried to get the sheriff to levy his *fi. fa.* on said land, but he would not, only because the same had been so set apart. Gunn, reciting these facts, asked the Court for a *mandamus* to compel such levy, upon the ground that, as to this prior indebtedness, said Homestead Act was not operative under the Constitution of the United States. The Court held it was, and refused to grant the *mandamus*. That is assigned as error.

JOHN T. CLARK; HOOD & KIDDOO, for plaintiff in error.

No appearance for defendant.

LOCHRANE, Chief Justice.

The question presented by the record in this case has been heretofore decided, as to its merits, by the previous adjudications of this Court, and, upon the doctrine of *stare decisis*, we concur in the ruling made upon this subject. The only matter before the Court is, whether our brother below erred in refusing a *mandamus* compelling the sheriff to levy a *fi. fa.* in his hands upon property set apart as a homestead under a *fi. fa.* in existence previous to the setting apart of such property as a homestead. And within the previous adjudications of the Court upon this subject we are of opinion that the

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Court committed no error in refusing to command the sheriff to commit a trespass ; for equity restrains trespasses, and the Courts will not by *mandamus* command their perpetration.

Judgment affirmed.

WARNER, Judge, concurring.

If this was an original question in this Court I should unquestionably hold that the judgment of the Court below should be reversed, but as a majority of this Court have repeatedly held and decided that the Homestead Act was a valid and constitutional Act as against judgments obtained prior to its date, and as the plaintiff in error desires an affirmance of the judgment of the Court below of this Court, so as to enable him to prosecute a writ of error to the Supreme Court of the United States so as to have the question finally determined, I am unwilling that he should be *obstructed* and *prevented* from the exercise of that right by the action of this Court on mere *technical* objections not affecting the main question in the case, and which were not made or decided by the Court below. For these reasons, I concur in the judgment of this Court, affirming the judgment of the Court below.

MCCAY, Judge, dissenting.

Where a *mandamus nisi* was prayed for by a plaintiff in execution to compel a sheriff to levy a *fi. fa.*, and it was stated in the petition that the petitioner was the holder of a *fi. fa.* founded on a debt contracted before the adoption of the Constitution of 1868, that he had directed the sheriff to levy on a certain parcel of land as the property of the defendant, that the sheriff had refused, giving as his reason that the land had been set apart, under the Constitution of 1868, as a homestead for the family of the defendant, that the defendant had no other property, and that the land set apart contained two hundred acres, it was error in the Court to refuse to grant the *mandamus nisi*.

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It was the duty of the sheriff to make the levy. If he would apparently be a trespasser he had a right to ask a bond of the indemnity from the plaintiff. But it is the right of the plaintiff to have the levy made, that the questions between the parties may be settled by litigation between themselves, and not between the plaintiff and the sheriff, who has no right to make the issue.

The Court should have granted the writ on condition that the plaintiff give bond to indemnify the sheriff in case the levy should be found to be a trespass, and he be held responsible for damages.

JOHN L. MOORE, plaintiff in error, vs. JAMES S. EWINGS *et al.*, administrators of W. A. HOUSTON, defendants in error.

1. As there is sufficient evidence in this case to sustain the verdict, and as the newly discovered evidence is only commulative, and would not, necessarily, change the verdict, there was no error in refusing a new trial.
2. Newly discovered testimony is only a ground for a new trial, when, if it were heard by the jury, it must, with considerable certainty, control the verdict.

New trial. Newly discovered evidence. Before Judge GREEN. Spalding Superior Court. February Term, 1871.

In 1863, W. A. Houston bought of Moore thirteen bales of cotton, which Moore was to keep and deliver to him at the end of the war. On the 4th of August, 1865, Moore gave Houston his note for \$291 00 in currency, with interest from date. Houston sued Moore on this note. He pleaded that the consideration "was a Confederate consideration, worth only fifty for one," and claimed the benefit of the Relief Act of 1868.

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The evidence of Houston was that four bales were missing when he demanded the cotton, and upon his letting Moore keep one bale, he gave said note in compromise of the claim for the missing cotton. Moore testified to his losses during the war, and said that there was not so much missing as Houston thought; he accounted for the missing cotton, except for one bale taken by him, by bad weather, etc., etc., showed that he was paid for it in Confederate currency, and showed its value at the time of payment. The jury found for the plaintiff the full amount of the note. Moore moved for a new trial upon the ground that the verdict was strongly and decidedly against the weight of the evidence, and because of newly discovered evidence. This newly discovered evidence was, by an affidavit by Moore, that five bales of cotton was put with that sold by oversight, of which he had no notice till after the trial. This testimony, he contended, would show that his account of the missing cotton was correct. The new trial was refused, and that is assigned as error.

PEEPLER & STEWART; DOYAL & NUNNALLY, for plaintiff in error.

SPEER & BECK, for defendants.

MCCAY, Judge.

1. It would, we think, be a decided infringement on the right of jury trial, to reverse this judgment, on the ground that the jury found contrary to the evidence. The most that can be contended for, is, that the weight of the evidence is against the verdict, since there is one witness who, if he is to be believed, states facts demanding just such a verdict. *Prima facie*, too, the case is with the plaintiff below, since the very giving of the note is an acknowledgment of a debt to the amount specified in the note. The burden of showing a mistake was upon the defendant at the trial. We have no

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acquaintance with the old gentleman whose testimony the counsel of the plaintiff in error gives such implicit credence to. We presume, however, the jury knew the witness. We are constrained to say, we do not agree with the plaintiff's counsel, that the weight of testimony is against the verdict. We do not think the mistake is, by any means, clearly made out, and the witness upon whom he relies so implicitly, however good and upright a man he may be, is evidently of frail memory, since he does not seem to know how many bags of cotton he had at the close of the war. The new testimony is not only cumulative, but we do not think it would materially help the case. It is still almost inexplicable, how this note should have been made, on the theory of the plaintiff in error. That there was a mistake in it, would, even with the new evidence, be only matter of inference, and that too, against the positive testimony of the payee of the note, who, if anybody, knows the facts, is supposed to be fully aware of what took place.

2. Newly discovered testimony is only a ground for a new trial, when, if it were heard by the jury, it must, with considerable certainty, control the verdict. We cannot see that such must have been the case. A verdict would have been sustainable under the evidence, even with this testimony. Our system of jurisprudence leaves the determination of questions of fact to the jury. The Court can only interfere when the verdict is strongly and decidedly against the weight of evidence, and even then the Code leaves much to the discretion of the Circuit Judge. We think the law right, and we would not change it if we could. Our experience is, that the jury is more often right than the Judge. The verdict of twelve men is, generally, correct, unless they be mistaken as to the law, and we repeat again, that we are indisposed to interfere with verdicts, especially if the Judge declines so to do.

Judgment affirmed.

JOHN A. DOMINICK, plaintiff in error vs. B. C. BOWDOIN,
jailor, defendant in error.

1. The Governor of this State granted an unconditional pardon to a party, who was afterwards arrested by the sheriff upon a bench warrant for the same offense pardoned by the Governor, and petitioned the Court for the writ of *habeas corpus*, and upon the hearing thereof, the Court refused to receive the pardon as evidence in favor of the applicant.

Held, That this was manifest error by the Court. It is the duty of all Courts, sitting for purposes of *habeas corpus*, or otherwise, to receive, without further evidence of its verity, the pardon of the Governor under the Great Seal of the State.

2. *Held, again*, That under the Constitution of 1868, which differs from the previous Constitutions of this State, in the grant of the power of pardon to the Executive, and contains only the same limitation upon the power that limits the Royal prerogative in Great Britain, by Act of William the Third, which is incorporated into the Constitution of the United States, and by the Courts in Great Britain, and of the Supreme Court of the United States, has been held, to authorize the exercise of the pardoning power *before* as well as *after* conviction, it was error in the Court to reject this pardon upon that ground.

3. *Held, again*, That pardons obtained by fraud are void, and upon suggestion of fraud upon the trial of *habeas corpus*, it was the duty of the Judge presiding to have heard the evidence, and passed upon its merits, as to the facts in the particular case, and it was error in the Court to hold that this question could only be enquired of by the jury.

Habeas Corpus. Pardons. Before Judge GREEN. Chambers. Spalding county, March, 1871.

Dominick was indicted in 1869, for murdering one Pilkinton, in said county, in 1868. A bench-warrant was placed in the sheriff's hands; he arrested Dominick on the 19th of February, 1871, and had him duly committed to jail. Dominick had *habeas corpus* issued to release him from imprisonment. The sheriff relied upon his arrest and detention on said bench warrant. Dominick replied, by producing and offering as evidence, a pardon by the Governor of this State, (R. B. Bullock,) dated the 20th of October, 1870. It recited, as reasons for the pardon, that said

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indictment was pending against Dominick, that he, the Governor, had a petition, numerously signed by citizens of Pike county, asking a discontinuance of said case, and Dominick's pardon, because he killed Pilkinton under the great provocation of Pilkinton's brutally and violently beating Dominick's mother; that Dominick was a man of good character, and his family absolutely needed his assistance; that the case, though so old, had never undergone judicial investigation, and "Hon. Thomas J. Speer, Senator of the Twenty-second Senatorial District, embracing Pike county, united in said petition." It "pardoned Dominick of the crime alleged against him in said bill of indictment, and every other charge of like nature, arising out of the same facts, or based upon the same transaction." It was duly authenticated. Counsel for the sheriff objected to this pardon being used as evidence, saying that it was procured by fraud, and that that issue of fact should be submitted to a jury, and could not be decided by the Judge. This objection was sustained; the pardon was ruled out, and the Judge remanded Dominick to jail. This is assigned as error.

D. J. BAILEY; HUGH BUCHANON, for plaintiff in error. As to pardoning power: Constitution of 1868, Art. 4, p. 5158; Art. 3, p. 4950. Pardon may antedate conviction: Cons. U. S., Art. 2, sec. 2, p. 5032, and Constitution of 1868, cited *ante*: 4 Wall. R., 334. Pardon binds Courts: 7 Peters, U. S. S. C. R., 150; 2 Bl. Com., 402; Ch. 1 Cr. L., 772; 4 Bl. Com., 401. It needs but to be produced: 3 Bouv. Ins., 447.

L. B. ANDERSON, Solicitor General; DOYAL & NUNNALLY; PEEPLES & STEWART, for defendant. *Habeas corpus* cannot discharge from bench warrant: R. Code, sec. 3947. Fraud in procuring it makes pardon void: 1 Bish. Cr. L. 754, 755; 8 Wright's Penn. R., 210, 219; 7 Bacon's Abr., 410. Conditional pardons: 2 Story on Con., sec. 1504 and

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note ; 18 How., 307 ; 1 Kent's Com., 306 ; 7 Peters, 150 ; 1 Bailey's R., 283 ; 8 Watts & S., 197 ; 1 Bish. Cr. L., sec. 711.

LOCHRANE, Chief Justice.

At the April Term, 1869, of the Superior Court of the county of Pike, John A. Dominick, the plaintiff in error, was indicted for murder. In October, 1870, the Governor of this State granted and caused to be delivered to him an unconditional pardon. Subsequently to this pardon he was arrested by the sheriff upon a bench-warrant issued from Pike Superior Court, upon the indictment for murder, and taken before some judicial officers in Pike county, who ordered him to be lodged in the common jail of the county of Spalding for safe keeping.

During his confinement in jail he applied for the State's writ of *habeas corpus*, which was granted, and, upon the hearing, the jailer assigned for cause of his detention and imprisonment the proceedings stated, and that he presented the pardon of the Governor after he was in jail, etc.

The Judge, sitting as a Court of *habeas corpus*, refused to receive the evidence of the pardon, and remitted the prisoner to jail, and this judgment of the Court below is the error assigned.

1. The important question to be decided in this case is the power of the Governor, under the Constitution of 1868, to grant pardons before conviction. The language of the Constitution of 1868 is in these words: "He shall have power to grant reprieves and pardons, to commute penalties, and to remit any part of a sentence for offenses against the State except in cases of impeachment."

The power conferred under this Constitution differs from that conferred by our previous Constitutions. In the Constitution of 1798, the language was: "He shall have power to grant reprieves for offenses against the State, except in cases of impeachment, and to grant pardons, or to remit any

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part of a sentence *in all cases, after conviction*, except for treason or murder, in which cases he may respite the execution, and make report thereof to the next General Assembly, by whom a pardon may be granted.”

From the 23d May, 1798, down to the Constitution of 1868, the power of the Governor was limited by the Constitution as to the nature of the offenses to be pardoned, and also to the time, or “*after conviction*.” By reference to our present Constitution, it will be seen these checks and limitations have been removed. His power to pardon is limited only in cases of impeachment, and the Constitution is silent as to the time when the power may be exercised.

The language of our present Constitution is similar to that used in the Constitution of the United States. Enumerating the president's powers, it says: “He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” It will be seen that the Constitution of the United States is also silent as to the time when the power may be exercised by the president. The power of pardoning may be traced among the earliest writers, as the prerogative of the sovereign authority, and no matter what reasons it may be founded upon, its existence has been recognized. The limitations in cases of impeachment, found in the United States Constitution, and the Constitution of 1868, may be found in Stat. 12 and 13, W. III., C., 2, which contains these words: “That no pardon under the great seal should be pleaded in bar to an impeachment by the House of Commons.” And this Act was, itself, founded upon the altercations which finally terminated in the dissolution of Parliament, arising out of the impeachment of the Earl of Danby, in 1678, before the Commons, and who presented as his plea in bar of such impeachment, the pardon of the King. The prerogatives of the Crown, and the legislative privileges of the Parliament of Great Britain, were practically settled by the revolution of 1688, but the subject has again and again been subjected to grave and learned dis-

cussions, and the rights and privileges of Parliament may be, perhaps, now conceded to be beyond the control of judicial tribunals. And the last speech of the celebrated Sir William Wyndham, was delivered in the House of Commons upon this very subject. But whatever claims of limitation against the power of pardon, in cases of impeachment, may have existed, the right as to *offenses* against the *Crown*, was yielded, as the unquestioned prerogative of the sovereign. And from the nation whence we have derived the great body of our laws, and fundamental principles of free government, we have also acquired the judicial exposition of the laws themselves, as precedents, worthy, in my judgment, to be accepted as the very soundest promulgation of what the law originally intended to announce. For myself, I entertain the very highest estimate of the learning and purity of the Judges who adorn the Bench of Great Britain, and upon a subject when, under the same *laws* copied from British statutes into our legislative system, I find the construction of their Courts, I yield to them a deference and consideration based upon my appreciation of their intrinsic value.

In the case at bar, the English Courts have held, in the language of Lord Coke: "A pardon is a work of mercy, whereby the King, *either before attainder, sentence or conviction, or after*, forgiveth any crime, offense, punishment, right, title debt, or duty," etc. The power of pardon exists either *before* or *after* conviction. This is the doctrine of the British authorities, and the power to pardon, as a royal prerogative, limited in cases of impeachment by act of William III., may be found as the power granted in the United States Constitution, in express words, with the same limitation. And the Supreme Court of the United States has given to it the same construction. In 18 Howard, 307, the reason for such construction is, that the words used in the Constitution of the United States conveyed to the mind the authority as exercised by the English Crown, etc. And in 4 Wallace, the construction given to the words used in the Constitution were

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similar to that given in Great Britain, and the power may be exercised *before* or *after* conviction. To give a different construction to the words used in our State Constitution would be to overrule the authority of the Courts of Great Britain, and that of the Supreme Court of the United States. For no reason exists, or can be said to exist, which would authorize a different construction, as to the power of the Governor of a State from that of a *President* or *King*, over the matters expressly delegated to him by the Constitution of the State. Indeed, our formal adoption of the common law makes it more applicable to our condition than it does to the President.

It is true that these decisions are not legally binding on us, and that, if we differed with the principles upon which they are based, we are free to set up our own opinions. This is clear, and out of this agreement upon principle, it may be urged, with great plausibility, that the terms used must mean, that pardons shall be limited to cases *after conviction*, or, in view of the language used, "he shall have power to grant *reprieves* and pardons, to commute penalties, and to remit any part of a sentence for offenses against the State, except in cases of impeachment;" that the word *sentence* qualifies the preceding provisions granting the power, or that the words "for offenses" against the State mean such offenses as are ascertained by trial, under the forms of law. If the meaning of the words used necessarily involve the requisition of a trial to establish the *fact* of the offense, before the power to pardon becomes vested in the executive, then the same necessity is implied under the very same language used in the Constitution of the United States; for the language there is, "he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." And the opinions of the Attorney Generals, and the decision of the United States Courts have not held the words "for offenses" to mean any such thing. But, again, it may be said that the words "for offenses," if it does

not mean those found guilty of offenses against the State, violates a fundamental rule of law, that "all men are presumed innocent until found guilty," and offenses cannot, in law, exist, until established by proof, by the verdict of a jury. This cannot have sufficient weight to set aside the opinions of such men as Lord Coke, or of the Supreme Bench of the United States, because no man need be tried if he does not want to. *He may plead guilty.* No power can compel him to go through a *trial* at all if he does not desire to plead *not guilty*, and the petition for pardon, or acceptance of it, is a *confession* of the imputed offense; the pardon granted is accepted upon the principle of its *confession*. This point, made upon this power, has undergone judicial decision and been the subject matter of discussion frequently, and decided as I have stated.

In 7 Peters, United States vs. Wilson, Chief Justice Marshall, a name that adds to a judicial opinion the weight of the highest judicial integrity and the most profound learning, treats a pardon as a *plea in bar*; and, as stated by Blackstone, 4th volume, 339, *it must be pleaded*. If pleaded then it is to prevent the very thing the construction contended for insists it cannot prevent, to-wit: a conviction. This construction would upturn the plainest written principles covering the law of pardons.

If we were to set up the individual reasons which might control us, as a new question, under our division of powers of the government, much more could be said against the interference with the executive, with the due course and administration of the laws, *after* than *before* conviction. In England, by a fiction, the King is the source of judicial power. He is the chief of all the Courts of law, and the
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but by the laws of the land. Much stronger reasons might therefore be given in favor of a *pardon before* than after Courts had convicted and sentenced the prisoner; that is, if we, for the time, concede that this power is not expressly granted by the people, the source of all power, and is a question of prerogative. But we confine ourselves to the precedents and decisions above stated, and, guided by them, we are of opinion the pardoning power of the Governor of this State is equal to the same power conferred by the Constitution of the United States upon the President, and subject to no other or greater restriction. And the decisions of the English Courts and American Courts upon this subject are uniform and conclusive. And we affirm the principles of construction therein enunciated in the language of the very able and distinguished Judge who presides over the Courts of the United States in this State, delivered by him in his judgment, protecting the property of the citizen from confiscation, upon the pardon granted to the claimant by the President, Mr. Johnson: "Although laws are not framed on principles of compassion for guilt; yet, when Mercy, in her divine tenderness, bestows on the transgressor the boon of forgiveness, Justice will pause, and, forgetting the offense, bid the pardoned man go in peace."

Holding, as we do, the *pardon* to be properly within the constitutional power of the Executive of this State to issue, when the petitioner presented his pardon under the Great Seal of this State, reciting the offense and the party, and unconditionally pardoning him therefor, it was the duty of the Court to have received it in evidence upon the hearing of the *habeas corpus*, and to have respected it as the act of the chief magistrate of this Commonwealth. And the bench warrant and orders of the Justices of the Peace ought to have been set aside, and the party discharged. This was the clear duty of the Judge. In cases of pardon, there no longer exists, in contemplation of law, any offense for the party pardoned to answer; it is blotted out, and ceases to be a cause

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to deprive him of his liberty. And, in any form, his right to present his pardon is unquestionable, and the duty of all Courts to respect it is not a matter for disputation, where there is nothing set up to render it invalid.

When, by suggestion of fraud in its procurement, the question of its validity is put in issue, or where the identity of the person pardoned, or the fact of its acceptance or delivery, are brought before the Court, in such case, if, upon *habeas corpus*, it is the duty of the Court to hear the testimony and pass upon the merits of the particular case, or, if pleaded upon the trial, then to hear evidence, and let the jury pass upon the case under the proof. For, while we hold the constitutional power exists in the Executive to grant pardons, we also hold that fraud in their procurement will render them void. In the case of the Commonwealth vs. Ahl, 43 Pennsylvania State Reports, (7 Wright,) 210, it is declared "A pardon procured by *false and forged representations* and papers is void."

When, on the trial, it appears that prisoner had nothing to do with the fraud, still it is void. *Ibid.* The Act of 1819, in this State, required, in all cases of application for pardon, a certified copy of the evidence should accompany the application, and the principle of the Act was to prevent imposition on the Executive. The rule was a good rule, and, while not applicable to this case, gives the spirit of the law, that the Executive should have the case before him to decide.

In the State vs. McIntyre, 1 Jones' Law Notes, 61 : "When a pardon is pleaded, and it appears from the pardon and the record that the Governor was misinformed, the pardon was held void."

We need not multiply cases, as enough has been quoted to show the fact that fraud will render the pardon void. We find no settled rule of practice or law laid down, nor do we intend to lay down more than the recognition of the general rule stated. As to what would or would not amount to *fraud*, or sufficient fraud to render it void, we deduce from

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the general rules of decisions, that misrepresentation of the facts material in the case upon which the Governor acted, and which ought to have prevented the clemency of the Governor, if known, or any concealment of the material facts of the case, or suggestion of false views to the Governor to procure the pardon, ought to be adjudged in the particular case by the Court or jury, as the issue may be joined.

In the case at bar, the Court ought to have taken the pardon offered as evidence without further proof. Its verity needs no other evidence than the usual issue under the Great Seal of the State. And he should have discharged the prisoner under it, except an issue of fraud was suggested. And if such suggestion were made it was his duty then and there, without a jury, but, upon the hearing upon *habeas corpus*, to have heard the evidence and decided the case upon its merits. If there was no fraud proved sufficient to render the pardon void it was his duty to discharge the prisoner. If there *was enough proven*, he ought to have remanded him; and under the facts in this case, from what appears in the certificate of the Judge, we reverse his judgment, but further direct him to receive the evidence of pardon granted, and if fraud is suggested in the proper mode, to cause an issue to be made, and thereupon hear the testimony offered and adjudge the case.

McCAY, Judge, concurring.

I am not prepared now to decide the question made upon the argument in this case as to the power of the Governor, under the Constitution of 1868, to pardon before final conviction. The point was not made or decided by the Judge whose decision is excepted to, and I think it unnecessary for the decision of the question made in the record to decide it here. The Judge refused to notice the pardon at all, even to look to it, to inquire officially whether it was granted before or after conviction, but for the single reason that, under section 3947 of the Code, if the petitioner was shown to be

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held under a bench-warrant, he should not be discharged. I think the Judge has given too rigid a construction to that section of the Code. Suppose the prisoner, in this case, had been prepared to show that he had been tried and found not guilty of the very offense for which the bench-warrant issued, would the Court hold that this could not be set up as a reason for discharge? All this section of the Code means, as I think, is, that, if the prisoner is in custody under a regular bench-warrant, the Court will not go behind it. But if it can be made to appear that the bench-warrant has become *functus officio*, that the bill has been *not prossed*, quashed, or the party found not guilty, or he proven to be out on bail, if any good reason be shown that the bench-warrant has ceased to be a legal warrant for his custody, he ought to be discharged from arrest under it. My own judgment is, that the Judge, in a *habeas corpus* case, may hear and adjudge any question of fact necessary to a legal solution of the questions presented in the case. If this pardon is a fraud he can hear, and, for the purposes of this writ, determine it.

I concur in the judgment overruling the Judge, on the ground that he ought to have received the evidence. As to its effect, and whether it was or was not a lawful pardon, that could not be determined until it was presented before the Court.

WARNER, Judge, dissenting, (after stating that the majority of the Court were not ready to deliver the opinion in *Hancock's* case.)

The two cases of Dominick vs. Bowdoin, jailer, and R. B. Bullock, Governor, vs. Hancock *et al.*, having been argued term, and as both cases in-
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by the Judge of the Superior Court, the grand jury having found a true bill against him for murder. A *habeas corpus* was granted by the Judge, directed to Bowdoin, the jailer, requiring him to bring the body of Dominick before him, together with the cause of his capture and detention. The counsel for Dominick produced before the Judge a written document which purported to be a pardon granted by the Governor for the offense with which he stood charged by the grand jury, and moved the Court to discharge him, which motion the Court overruled, and remanded him back into the custody of the jailor; whereupon the prisoner, by his counsel, excepted. In the case of R. B. Bullock, Governor, vs. Hancock, a *scire facias* was pending in Court to forfeit the recognizance of Hancock, (who had been indicted for the offense of an assault with intent to murder,) and his securities. The defendants pleaded, in discharge of their liability, a written document purporting to be a pardon by the Governor, pardoning Hancock, the principal in the bond, for the offense with which he stood charged. The Court overruled the plea of pardon, whereupon the defendants excepted. In the case of Dominick, it is recited in the document claimed to be a pardon, that it had been represented to the Governor, by a petition, that the homicide had been committed in consequence of the great provocation rendered by the deceased, in most brutally and violently beating the mother of the accused, and that his family is in absolute need of his assistance and support, that the homicide was committed nearly two years ago, and the case had never undergone a judicial investigation, and that the Hon. Thomas J. Speer, Senator of the Twenty-sixth Senatorial District, embracing the county of Pike, had united in the prayer for the pardon of Dominick, etc. Whether the foregoing alleged recited facts were made to appear to the Governor on the oath of competent witnesses, or otherwise, does not appear, but the evidence must have been satisfactory to the Governor, whatever its character may have been; for he granted a pardon relieving and discharging

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him from the crime alleged in the indictment, and every other charge of like nature arising out of the same fact or based on the same transaction. In the case of Hancock, the written document, offered as a pardon recites, amongst other things, that the pardon was not granted for the purpose of shielding him (the offender) from the hands of justice, but merely for the sake of those who have become sureties on his bond, in order to prevent damage and injury being done to them. It appears in the record that there were fourteen securities on the bond, which was for the sum of four hundred dollars. This is the first time the interpretation of the Constitution of 1868, in relation to the exercise of the pardoning power by the Governor has been presented to this Court for its consideration and judgment, and it should be so interpreted and construed as to maintain and preserve *intact* every clause and section of that instrument, defining the power of the Executive Department according to the true intent and meaning thereof. The question in these cases is, not what was the power of the Crown in England, or of the President, under the Constitution of the United States to grant pardons for offenses before trial and conviction, but *the* question is, whether the Governor has the power to grant a pardon for offenses against the State, before trial and conviction, under the provisions of the Constitution of the State of Georgia.

By the 2d section of the IVth Article of the Constitution of 1868, the Governor has the power conferred on him "to grant reprieves and pardons, to commute penalties, and to remit any part of a sentence for *offenses against the State*, except in cases of impeachment." The Governor, under the Constitution, has the power to grant pardons "for offenses against the State." What is an offense, in the legal sense of the word? Bouvier defines the word as follows: "What a *penal law* forbids or what it commands; in this sense." 2 Bouvier's Law Dictionary. The Constitution does not confer the power on

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the Governor to pardon any person *charged* with an offense against the State. And the simple reason is, that every person so charged is presumed to be *innocent* thereof, until his guilt is proved and established, in the manner prescribed by law; and until that is done, there is no offense against the State to be pardoned by the Governor, of which he has any *legal cognizance* for that purpose. The Governor has no power or authority, under the Constitution, to *assume* in advance of a trial and conviction, that a person *charged* with an offense against the State is guilty of that offense, and, acting upon that *assumption*, proceed to pardon him therefor; for, if he is not guilty of the offense charged against him, he needs no pardon. The Executive Department of the government has no power or authority, under the Constitution, to hear evidence and decide upon the guilt or innocence of a person charged with an offense against the State, in advance of a trial therefor; the power and authority to do that is conferred by the Constitution on the Judicial Department of the government. The Executive and Judicial departments of the government are *distinct*, and the Executive Department cannot exercise any power which is properly attached to the Judicial Department. What is a pardon, in the sense which that word is used in the Constitution? "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from *the punishment* the law inflicts for a crime he has *committed*:" 2 Bouvier, 261. In Comyn's Digest, it is said, "So the King may pardon all offenses of which a man is attainted or *convicted*:" 7 Comyn's Digest, marginal page, 50, title Prerogative, letter D. A pardon, in the sense which that word is used in the Constitution, is to *exempt* the individual to whom it is granted from *the punishment* which the law inflicts for an offense against the State, which he has committed, and for which he has been duly *convicted according to law*. Until trial and conviction, for an *offense* against the State, in the manner prescribed by the Constitution and laws

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thereof, there is *no punishment* which the law inflicts for that offense, to exempt the individual from by a pardon. To exempt the individual from the punishment of an offense against the State, inflicted by the law, by granting a pardon to him, he must first be *convicted* of that offense according to law; otherwise, the law does not inflict any punishment on him, which requires a pardon to exempt him from that punishment. The establishment of the guilt of the party charged with an offense against the State, according to law, is an indispensable prerequisite to the infliction of *the punishment* prescribed by law; and until that is done, no punishment can be inflicted on the party, and no pardon is required to exempt him from it. The presumption of the law is always in favor of innocence, until the contrary is legally established.

A party may be *charged*, under oath, with having committed an offense against the State, or he may be *accused* by the grand jury of an offense against the State; but such charge or accusation does not authorize any *punishment* to be inflicted for that offense until the party so charged or accused has first been tried and *convicted*. therefor according to law. Until *trial* and *conviction* for an offense against the State, the Governor can have no *legal* evidence or *official* knowledge that an offense against the State has been committed which will authorize him to grant a pardon therefor under the Constitution. The power conferred by the Constitution is to grant pardons *for offenses against the State*, not for offenses *charged* to have been committed against the State. Is it competent for the Governor to hear evidence and pass upon the guilt or innocence of a party *charged* with an offense against the State, and to pardon him for that offense in advance of any trial therefor, as provided by the Constitution

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ment of the government has no jurisdiction, power or authority under the Constitution to hear and determine as to the guilt or innocence of any person *charged* with an offense against the State, it necessarily follows that that question must be decided by the Judicial Department of the government where the jurisdiction and power to decide it is vested by the Constitution, and until it has been so decided the Executive Department has no power or authority to interfere with the jurisdiction of the Judicial Department in regard to *that question*. When the party *charged* with an offense against the State shall have been found guilty of that offense by the Judicial Department of the government, and the sentence of the law shall be inflicted on him for that offense, then the Governor has the unquestioned power, under the Constitution, to grant a pardon to the offender, and relieve him from the punishment inflicted by the law for that offense against the State. If the words "after conviction" had been inserted in the Constitution of 1868 it would have been mere *surplusage*, for there could not have been any *offense against the State* to be pardoned, in the legal sense of that word as used in the Constitution, until the party charged therewith had first been tried and *convicted* of that offense, in accordance with the laws thereof. An offense against the State must first be established before the Governor can grant a pardon for that offense under the Constitution, and that offense against the State can only be established by trial and *conviction* therefor, as provided by law. Before there can be a pardon legally granted by the Governor to any person for an offense against the State, under the Constitution, it must first be shown that an offense against the State has been committed by such person, and the only *legal evidence* of that fact is the trial and *conviction* of the person charged therewith, as required by the laws of the land. It cannot properly be said that any person is guilty of an *offense* against the State until that person has been *legally tried and convicted therefor*. Until there has been a legal trial and con-

viction of a person charged with an offense against the State, in the proper Court having jurisdiction thereof, the Governor, under the Constitution, has no power to grant a pardon for that offense, and no pardon is necessary to exempt such person from punishment for that offense before trial and conviction therefor. There must be an offense against the State *legally established* before that offense can be pardoned by the Governor, as contemplated by the Constitution. Before the pardoning power conferred by the Constitution can be legally exercised by the Governor there must necessarily be *an offense against the State, legally established, to be pardoned*. The plain language of the Constitution is, that the Governor "shall have power to grant pardons for offenses against the State." If there is no offense against the State, established by the trial and conviction of the party charged therewith in the manner prescribed by law, then there is no offense against the State to which the pardoning power, as contemplated by the Constitution, can be made applicable.

But it is said that the clause in the Constitution of 1868, relative to the power of the Governor to grant pardons for offenses against the State, is similar to that in the Constitution of the United States, and that the Supreme Court of the United States has decided that the President, under that Constitution, may grant a pardon for offenses against the United States before conviction. That may be conceded, and still the Governor, under the Constitution of this State, would not have the legal power and authority to do so. The Constitution of this State contains a provision in it that is not in the Constitution of the United States. The 31st section of the 1st Article of the Constitution of this State declares, "That the Legislative, Executive and Judicial Departments department shall be confided to a
acy. No person, or collection of
artment, shall exercise any power
er of the others, except in cases
" This section of the Constitution

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was intended to *restrain*, and *does restrain*, the Executive Department of the State Government from all interference with the powers, duties and functions of the Judicial Department in the due administration of the laws of the State, which is vested by the Constitution in the latter department. When the Judicial Department of the State Government shall have tried and convicted a person charged or accused of an offense against the State, in accordance with the laws thereof, then, that department has performed its appropriate functions, and the Governor may then exercise the pardoning power vested in him by the Constitution. But to interfere with the due administration of the laws of the State by the Judicial Department thereof, before trial and conviction, by granting a pardon for the offense with which the defendant stands charged in the Courts of the State, or before he is so charged, and thereby prevent and defeat the due administration of the law by the Courts, would be to exercise a power properly attached to the Judicial Department, which the Constitution expressly forbids. To hear evidence and determine whether an offense has been committed against the State, belongs *exclusively* to the Judicial Department of the State Government. Whenever the Executive Department assumes to decide that any person has been guilty of an offense against the State, before trial and conviction therefor, as provided by law, and then proceeds to grant a pardon to such person for that offense, it is an *usurpation* of authority not conferred on the Executive Department by the Constitution, but expressly denied thereby. The Governor has the power, under the Constitution, to grant a pardon for an offense against the State, when the fact has been made known to him by competent legal evidence that such an offense has been committed, by the trial and conviction of the offender before the proper tribunal; but there is no express power conferred on *him* to hear evidence and determine that an offense against the State has been committed, so as to lay the foundation for a pardon for that offense.

The ascertainment of the fact whether an offense against the State has been committed, properly belongs to the Judicial Department of the government, under the Constitution, and not to the Executive Department; and whenever the Governor assumes or undertakes to decide that an offense against the State has been committed for the purpose of granting a pardon therefor, he assumes and undertakes to exercise a power which the Constitution of the State prohibits; for no person, or collection of persons, being of one department, shall exercise any power properly attached to either of the others, except in cases therein *expressly* provided. It cannot be denied that the power to hear evidence and ascertain the guilt of persons charged with having committed offenses against the State is a power properly attached to the Judicial Department of the State government; and, that being so, the Executive Department has no power or authority to interfere with it by granting a pardon before a trial and conviction therefor, so as to defeat the exercise of that power by the Judicial Department, but, on the contrary, is expressly prohibited from doing so by the Constitution. Whatever may have been the power claimed for the King in England, or for the President, under the Constitution of the United States, to pardon for offenses before trial and conviction, the Constitution of this State studiously keeps the powers of the Executive and Judicial Departments of the government separate and distinct, and the pardoning power of the Governor cannot be exercised until there has been a trial and conviction for an offense against the State by the Judicial Department, as provided by the Constitution and the laws thereof. To hold otherwise would be to decide that the Executive Department of the State government had the power
ine the question of the guilt
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Carr vs. Lee et al.

bids. Construing that section of the Constitution which confers the power on the Governor to grant pardons for offenses against the State, in connection with the 31st section of the 1st Article thereof, it is quite clear to my mind that it never was intended that the Governor should exercise the pardoning power before trial and conviction by the Judicial Department of the Government. As has been already shown, there must be an offense against the State to be pardoned, and, under our Constitution, that fact cannot be legally ascertained, except by a trial according to law by the Judicial Department of the government, and whenever the Executive undertakes to assume, or hear evidence as to the fact that an offense against the State has been committed before trial and conviction, it is an *invasion* of the functions of the Judicial Department, which alone can furnish the only legal and competent evidence of that fact under our Constitution. This, in my judgment, is a fair and proper construction of the Constitution of this State so as to prevent the *abuse* of the pardoning power by the Governor, to the great detriment of public justice. I am, therefore, of the opinion that the judgment of the Court below, in both cases, should be affirmed, on the ground that the Governor, under the Constitution of this State, had no power to grant a pardon for either of the offenses charged before a trial and conviction therefor in the Courts of the State, as provided by that Constitution and the laws in pursuance thereof.

BENJAMIN F. CARR, plaintiff in error, *vs.* A. H. LEE, executor *et al.*, defendants in error.

Where a summons of garnishment has been served on a defendant, and he can protect himself in a Court of law by filing his answer, stating the fact as to his indebtedness, a Court of equity will not interfere by granting an injunction to restrain the parties in the exercise of their legal remedies.

Carr vs. Lee et al.

Garnishment. Set-off. Injunction. Before Judge GREEN.
Newton county. October, 1871.

This bill contained the following averments: Carr, late in 1862, or early in 1863, contracted with Isaac P. Henderson for a house and lot in Covington. Carr then lived in Covington, and had a comfortable home. He had married Henderson's youngest child. Henderson was then nearly seventy years old, and his wife was aged. Henderson's other children were married and had homes. Henderson and his wife lived alone. Henderson was old, and his eyesight was failing, and proposed that Carr should sell his home and live with him. After being urged thereto, Carr sold his home, now worth \$3,000 00, on credit, and has lost nearly its whole value, by reason of the purchaser having resold it and being insolvent.

When Carr went to live with Henderson, he bought Henderson's house, giving therefor his note for \$5,000 00, to be due at Henderson's death, without interest, and allowing Henderson to live with him and use part of the house during his life. In the fall of 1864, Henderson died testate. By his will, Augustus H. Lee was appointed his executor, and has qualified as such. Mrs. Henderson survived Henderson, and continues to live with Carr, he furnishing her board, etc., etc. By the will, Lee was directed to pay Mrs. Henderson \$5,000 00 during her life, and a sum sufficient to buy a servant, to serve her during her life. Lee found Carr's note among Henderson's assets, and took charge of it. Mrs. Henderson would have accepted it, but Lee would not let her have it.

said note, Lee sued him. The award was, that Carr should it was a Confederate contract. Judgment of the Superior Court, issued thereon, and was levied the sale was stopped by affidavit. This affidavit was dismissed.

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The sheriff is now proceeding to sell said land, under said *fi. fa.*, in November, 1871. Mrs. Henderson sued Lee, as executor, and obtained a judgment against him for, say \$7,000 00, on the 4th of October, 1871, and has garnisheed Carr. If he pays Lee, she will take a judgment against him for the \$3,500 00, and interest, which he owed Lee, as executor, when he was garnisheed. And she is unable to respond to him in damages. Besides, she owes him, Carr, say \$2,500 00, for board, etc., and, in equity, this account should be allowed him as a set-off against her garnishment.

He prayed injunction against the sale by Lee's *fi. fa.*, and that this set-off be allowed, and that he pay the balance to Mrs. Henderson, in full discharge of said *fi. fa.*, and that she be enjoined from pursuing her garnishment at law. The Chancellor, after argument, refused the injunctions. That is assigned as error.

A. B. SIMS, for plaintiff in error.

L. B. ANDERSON ; J. J. FLOYD, for defendants.

WARNER, Judge.

This was a bill filed praying an injunction on the following statement of facts : In March, 1868, Lee, executor of Henderson, obtained a judgment against Carr, the complainant, for \$3,500 00, on which an execution issued, was levied on Carr's property, and advertised for sale by the sheriff on the first Tuesday of November, 1871 ; that, on the 4th October, 1871, Ruth Henderson, a judgment creditor of Lee, whose judgment was obtained 29th March, 1871, sued out a summons of garnishment against Carr, requiring him to answer at the Superior Court of Rockdale county, on the second Monday in March, 1872, what he was indebted to Lee. The Court refused the injunction, and the complainant excepted. If Carr's property had been sold as advertised on the first Tuesday in November, 1871, and had satisfied Lee's judg-

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ment against him, then he would not have owed him anything, and could have so answered the summons of garnishment in March, 1872, but if the sale of his property did not satisfy Lee's judgment, then he could answer what amount he then owed Lee after deducting the amount for which his property levied on had been sold, so that there would have been no difficulty in protecting himself from having to pay the debt twice, as the summons of garnishment did not require him to answer until March, 1872, and Lee's judgment, being of older date than the service of the summons of garnishment, would have protected him as against Ruth Henderson's garnishment as to the amount of the sale of his property. Let the judgment of the Court below, refusing the injunction, be affirmed.

LOCHRANE, Chief Justice, and McCAY, Judge, concurred for different reasons, but wrote no opinions.

T. F. GRUBB *et al.*, trustees, plaintiffs in error, vs. R. B. BULLOCK, Governor, defendant in error.

Where the pardon of the Governor was pleaded by the sureties in discharge of their bond for the appearance of their principal, and the recital of facts in the pardon showed that it was not applied for by the accused, who was out of the State, and the plea failed to show *its delivery to him and acceptance by him*, and the Court sustained a demurrer to the plea:

Held, Under the facts, there was not error. Assuming that, under the Constitution of 1868, the Governor may exercise the pardoning power *before* conviction, (see decision of this Court in *Dominick vs. jailor Spalding county*, and 29 Missouri, 300,) yet pardons *before conviction* are based upon the confession of the imputed guilt by the accused, and before such pardon takes effect it must be accepted by the accused, and when the plea of pardon by sureties fails to set up its acceptance by their principal, evidenced by his application for the pardon and delivery to him or his acceptance of it when done, the pardon, granted without the application of the principal and not evinced by his acceptance of it, is of no effect. See concurring opinions.

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Recognizance. Pardon. Before SAMUEL HALL, Judge *pro hac vice*. Upson Superior Court. May, 1871.

This cause was tried before Samuel Hall, Esq., Judge *pro hac vice*, by consent. Hancock was indicted for having committed an assault, with intent to murder one Spivey *et al.*, in said county, on the 13th of September, 1867. He was arrested, and gave bond for \$400 00 for his appearance to answer said charge, with ten sureties. At November Term, 1869, the bond was estreated. *Scire facias* was served upon the sureties, requiring them to show cause why the rule for forfeiture of the recognizance should not be made absolute. Hancock was not served, and the securities admitted that he had fled from the State. They said the rule should not be made absolute, because Spivey had been pardoned by the Governor of this State. And they pleaded a pardon in due form, and duly executed, whereby Governor Bullock pardoned him, and after reciting the pendency of the indictment, recited therein that a petition had been presented by Hancock and said sureties, asking for his pardon, because, since they signed his bond, he had absconded, and they could not arrest him, and to pay his bond would greatly injure them, "who were of limited means, and solely depending upon their daily exertions for a support;" and that one of the prosecutors earnestly joins in the petition, "not for the purpose of shielding him from the hands of justice, but merely for the sake of those who have become sureties on his bond."

Counsel for the State demurred to the plea: 1st. Because pardon could not go before conviction. 2d. Because this was no pardon, but simply an illegal attempt to relieve the sureties. 3d. Because it was not pleaded that said pardon was delivered to, and accepted by Hancock. The demurrer was sustained and judgment was entered against the sureties. This is assigned as error.

DOYAL & NUNNALLY; J. I. HALL, for plaintiff in error.

SMITH & ALEXANDER; L. B. ANDERSON, Solicitor General for the State.

LOCHRANE, Chief Justice.

There can be no question as to the right of sureties to plead the pardon of their principal in answer to and defense of their contract with the State, to produce him to answer an alleged offense. This legal proposition is abundantly sustained by authority. It would work the grossest injustice if it were held otherwise. The accused is under arrest, by the State, for an offense against the criminal law; he is surrendered to his securities, upon their entering into a bond and binding themselves for his appearance at the Court to answer the charge made. If the State pardons the principal and blots out the offense, there is nothing for him to answer; and it would be the grossest injustice to bind the security, when the means of compelling his attendance had been annulled.

But to make the pardon valid as to the securities, it must be valid as to the principal, and the plea by such sureties must show the *delivery of the pardon to him, and its acceptance by him*. The law works no injustice, and when sureties fail to show a pardon valid as to their principal, it cannot be available as to them. We have no hesitation in affirming the views we expressed in the case of *Dominick vs. the jailor of Spalding county*, at this term, sustained as it is by the authority of the Courts of Great Britain and of the United States, without a dissenting voice. True, if called upon by indictment, it must be pleaded. True, it is a plea, but it is *a plea in bar*; a plea that stops the Court and demands a discharge of the party. No Court can disregard it, none set it aside. When pleaded, it blots out the offense, and the offender stands covered with it as a shield against prosecution. *If conviction had to take place before pardon could be granted, then it would be a plea in arrest*, but in 7 Peters', *United States vs. Wilson*, Chief Justice Marshall treats a pardon

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as a plea in bar. In bar of what? Why, surely, a prosecution. If a plea in bar of a prosecution, then as surely it may be granted before conviction; because, if not granted before conviction, it would be no plea in bar of a prosecution. These legal truths are self-evident, and to rational minds, learned in law, assert their own force, without necessity of argument to demonstrate them. And equally clear is it, that if a pardon may be pleaded in bar of a prosecution, it is not necessary to have the prosecution to ascertain whether an offense has been committed; else, it is not a *plea in bar*, and all writers on the subject have been ignorant of its character and effect. Our opinion, sustained by the learning of the greatest names that ever adorned the judicial history, names that have risen out of the cloud to shine as fixed stars, and have overflowed history with glory, we feel assured is based on principles of law as eternal as the science itself.

But while a pardon may be granted before as well as after conviction, it must be granted to the principal upon his application, or be evidenced by a ratification of the application by his acceptance of it. For the theory of pardon is preceded by confession of the imputed guilt. When the people of Georgia accepted President Johnson's pardon there was no necessity of a conviction to ascertain the offense committed; it was conceded. The amnesty he poured out over the whole country, by wholesale, the Courts of the United States have recognized. In what fearful peril might all have been plunged by a different rule of construction, subjected to indictment, costs, exposures and imprisonments! Against all these his pardons before conviction were pleas in bar to stop the machinery of a prosecution, but these pardons had to be accepted as evidence or to be used as evidence. And inasmuch as the pleadings here fail to show any application or any acceptance by the principal, we affirm the judgment of the Court below.

Judgment affirmed.

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MCCAY, Judge, from the bench, concurred, upon the ground stated in the head-note, saying he was undecided as to the legality of a pardon before conviction. He wrote no opinion.

WARNER, Judge, concurring.

I concur in the judgment of affirmance, in this case, on the ground that the Governor had no legal power or authority, under the Constitution of this State, to grant a pardon before trial and conviction of the defendant for the offense with which he was charged.

E. H. PUGH, plaintiff in error, vs. JERRY McCARTY, plaintiff in error.

1. It is not error for the Court to charge the jury that the words as alleged in the declaration are libellous, as that is not an expression of opinion as to the evidence before the jury.
2. It is error for the Court below to refuse to charge the jury when requested, in writing, in the language of the judgment of this Court, on the same statement of facts in a case between the same parties which had previously been adjudicated in this Court.

Libel. New trial. Before Judge GIBSON. Richmond Superior Court. January Term, 1871.

This cause was here before. See 40 Georgia Reports, 444. Plaintiff read in evidence the article published in The Daily Press of Augusta, so much of which as is important is copied in 40 Georgia Reports, 445. It was shown that, at the date of said publication, defendant was publisher of said newspaper; that, at that time, plaintiff was clerk of The Chronicle and Sentinel newspaper office, and that McGregor, the other party named, was the mail clerk of The Daily Press; that these papers were disputing as to their respective circulation in Augusta when said article was published;

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that this dispute was as to the comparative advantages of said papers as advertising mediums, and to the right of one to the post office advertisements in preference to the other. Defendant introduced no testimony.

The Court charged, at the request of the plaintiff's counsel : 1st. "To charge of another in a newspaper, printed, published and circulated in the county, that he is convicted of perjury, is actionable without proof of special damage, although the charge may not, in the opinion of the jury, amount to a charge of legal perjury," he added : "Nor do I charge you that it is legal perjury." 2d. "The words charged in the declaration are libellous, and the jury may give exemplary damages if they believe that the defendant intended, and did by their use, impute the crime of legal perjury to the plaintiff." 3d. "In all such cases as these, if the jury believe the words charged were published by the defendant, and that the words are in themselves actionable, it is not necessary to prove special damages ; the jury may give such damages as they believe, under all the circumstances of the case, would compensate for the injury done to the plaintiff, and inflict such punishment as the law allows to be inflicted upon the defendant." He further charged that, even if a newspaper quarrel was going on, and the plaintiff and defendant took part in it, and published libellous matter of each other, if one party sued the other, evidence of the publication of libellous matter published by the party suing, concerning the other party, ought not to reduce the damages, because one libel cannot be brought in as a set-off against the other. Unless the jury believe, from the evidence, that defendant published against plaintiff a libel, they must find for the defendant. If the publication complained of was made by defendant with the *bona fide* intent to protect his own interest in a matter where it was concerned, they must find for defendant.

He was requested, by defendant's counsel, to charge : "When a dispute is conducted between two newspapers as to

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the extent of their city circulation, and their employees volunteer to take part in the strife, and one charges an employee of the other, who is aiding in the quarrel, with theft and duplicity, and the other charges, in return, that the employee of the first has been convicted of perjury by the solemn oath of a gentleman whose veracity stands unimpeached and unimpeachable, and the latter brings suit for a libel on the charge contained in this public reply, the jury should give nominal damages only." He refused so to charge, upon the ground that it was not warranted by the evidence. The jury found for plaintiff for \$1,500 00 damages.

Defendant's counsel moved for a new trial, upon the grounds that the verdict was excessive, contrary to law and evidence and the latter part of the charge; because the Court erred in charging as requested by plaintiff's counsel, and refusing to charge as requested by defendant's counsel. The new trial was refused, and that is assigned as error on said grounds.

HILLIARD & KING, for plaintiff in error.

A. R. WRIGHT, for defendant.

WARNER, Judge.

This was an action brought by the plaintiff against the defendant to recover damages for the printing and publishing a libel in the columns of a daily newspaper. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$1,500 00. The defendant made a motion for a new trial, on several grounds, which was overruled by the Court, and the defendant excepted. This case was brought before and decided by a majority of the Court on the facts as presented on the last trial, the evidence in the two newspapers was more or less the same.

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1. The first ground of error assigned to the charge of the Court, is in charging the jury, "that the words charged in the declaration were libellous." There was no error in this charge, as it amounted to nothing more than saying that the words charged in *the declaration* were actionable as a libel, under the law. The Court expressed no opinion as to whether the evidence, as proved on the trial, made out a libel, under the circumstances attending the publication. If the Court had charged the jury, that the evidence in the case constituted a libelous publication, under the circumstances attending it, that would have been error, because it would have been an expression of opinion upon the evidence in the case.

2. The counsel for the defendant requested the Court to charge the jury in the exact language of the judgment of a majority of this Court, as applicable to the facts of the case, that "where a dispute is conducted between two newspapers as to the extent of their city circulation, and their employees volunteer to take part in the strife, and one charges an employee of the other, who is aiding in the quarrel, with theft and duplicity, and the other charges in return that the employee of the first has been convicted of perjury, by the solemn oath of a gentleman, whose veracity stands unimpeached and unimpeachable, and the latter brings suit for a libel, on the charge contained in this published reply, the jury, in such cases, should find nominal damages only." The Judge states that he refused this charge for want of proof, but the record shows that the proof was quite as full on the last trial, and a little more so, than on the former trial. See *Pugh vs. McCarty*, 40 Georgia Reports, 444. Whether the former judgment of a majority of this Court was right or wrong, as applicable to the facts of the case, still, it was the judgment of the Court, and the law of the case, which the Court below, under the 4220th section of the Code, was bound to respect, and, in good faith, to carry into full effect; and, therefore, should have given to the jury the charge as requested, and it was error in refusing to do so. However erroneous the

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judgment of a majority of this Court may have been, as to the law applicable to the state of facts, it was not the province or the duty of the Court below to question that judgment by a refusal to administer the law as declared by it.

Let the judgment of the Court below be reversed.

McCAY, Judge, concurring.

I concur in the judgment of reversal in this case. I think there was some evidence that the plaintiff had voluntarily interfered in this controversy between the conductors of the newspapers engaged, and, under the decision of the Court when this case was previously before it, *in such a case* the damages ought only to be nominal. I do not, however, look upon the decision of this Court, as then made, as settling the question that the plaintiff was a volunteer. The decision referred to was based upon the idea that the damages were excessive, and it does not at all follow that, if the damages had been more reasonable, this Court would, upon this ground, have undertaken to control the jury in their judgment. As one of the majority which gave that decision, such is, at any rate, my view of the matter. Whether the plaintiff made the affidavit on which this charge of perjury is based as a volunteer in the newspaper controversy, after the managers of the paper had begun their diatribes against each other, or whether he made the affidavit in the regular course of his business, as clerk, for the information of the postmaster, and the public controversy grew out of that affidavit, were questions for the jury, under the charge asked and refused. In the latter case, reasonable damages might well have been given under the charge, as asked.

Wilson *et al.* vs. The Augusta Factory.

R. J. WILSON, tax receiver *et al.*, plaintiff in error, vs. THE AUGUSTA FACTORY, defendant in error.

The Augusta Factory, an incorporated company, is only liable, under the existing laws of this State, to pay a tax on the whole amount of the capital stock of the company paid in, and not on the market value thereof:

Held, That the Augusta Factory Company is liable for the payment of all legal taxes on the property owned by it as a corporation which is not included as a part of their capital stock and constitutes no part thereof. MCCAY, Judge, dissenting.

Corporations. Taxation. Constitutional law. Before Judge GIBSON. Chambers. Richmond county. July, 1871.

The bill of the Augusta Factory made this case against the tax collector and receiver of said county: In June, 1858, certain persons formed a partnership, under the name of the Augusta Factory, and soon after, bought from the Mayor and Council of Augusta the mills, machinery and franchises of the Augusta Manufacturing Company, for \$140,000 00, that being the price which the Mayor and Council of Augusta had paid said manufacturing company for said property. On the 17th of December, 1859, these partners were incorporated, under the name of the Augusta Factory, with the powers, etc., granted to the McBean Company, on the 11th of February, 1850. They accepted this charter of 1859, conveyed their shares to the corporation, and gave the Mayor and Council of Augusta the corporation's bonds for said \$140,000 00.

The capital stock of the corporation was then \$200,000 00, being two thousand shares of \$100 00 each, and its capital consisted of real estate and mills and machinery therein, valued at \$140,000 00, and \$60,000 00 paid in by said stockholders for working capital.

So the capital stock remained till January, 1863, when, owing to the change in the value of currency, and subsequent purchases of real estate, for operative's houses, it was in-

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creased, by a stock dividend, to \$600,000 00, or six thousand shares, at \$100 00 each. At this sum it has since remained; that is the full cash value of the property, exclusive of their reserve fund. They have returned said capital for taxation, and, pursuant to section 812 of the Code of Georgia, they paid, annually, a tax of forty cents on each \$100 00 on said \$600,000 00, as the highest amount of capital paid in. This tax has been increased by addition of the county tax thereon. This has been done since said increase of stock. And they proposed to return the same for taxation in that way for 1871, but the tax receiver refused so to receive it, but insisted that they should return the capital stock at its market value, to-wit: \$162 00 per share. In this he was backed by the Comptroller General. Injunction was prayed for against the collector and receiver. The Chancellor ordered them to show cause why the injunction should not issue.

Answering, they admitted the organization of the corporation and purchase of property, as charged. They denied that \$140,000 00 was the value of the property in 1859, for that the same property was given in for taxation, in said county, in 1854, at \$409,420 00; the same real estate and buildings, in 1866 and 1867, were given in at \$400,000 00, and these defendants believe the property of the corporation now worth \$500,000 00. The corporation had heretofore given in its taxable property, in said county, as follows: 1861, at \$225,000 00; 1862, at \$230,000 00; 1863, at \$1,500,000 00; 1864, at \$6,000,000 00; 1866 and 1867, "city property," at \$400,000 00, and capital, at \$200,000 00; and in 1868, 1869, 1870, "city property," at \$200,000 00, capital, \$220,000 00, and money and solvent debts, at \$180,000 00. They deny that the currency affected the said increase of stock to \$6,000,000 00, and call attention to the fact that they made no change of that figure when currency changed.

The returns could not be under section 812 of the Code, because this company has no banking privileges, and that section applies to none other than corporations with such

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privileges; because their returns must be to the Comptroller General, by section 822, and upon such returns, no county tax can be levied. If it gave in under section 812, they must have returned net profits, and all other its property and effects, by section 4828; and yet they made no such return, though they made such profits, and had such other property, etc., as appears by their exhibited reports. The answer concludes with further averments, to show that they are proceeding according to law, *bona fide*, and that the property should be taxed at a much larger figure than \$600,000 00.

They objected to the injunction, upon the grounds, that there was no equity in the bill, as the remedy at law was adequate; or, if not, the equity was sworn off by the answer.

The Chancellor granted the injunction, upon condition that the corporation give in for taxation, in addition to its capital stock, a full account of all its *taxable* property owned and possessed by it, with its true value. The tax receiver and collector say this was error, because the stock should be taxed at its value in the market, and the factory assign as error the condition upon which injunction is ordered.

MCLAWS & GANAHL, for tax collector and receiver. Capital stock to be taxed at market value: Code, secs. 799, 801; Constitution 1868, Art. I., secs. 21, 22. Meaning of "paid in:" Code, sec. 813; 8 Ga. R., 486; 10th, 162; 11th, 570.

W. HOPE HULL; F. MILLER, for Factory. Market value not to be regarded: Code, secs. 799, 813; 31 N. J. R., 512; 1 Hal., 100; 4 Hill, 20; 7th, 261, 276; 2 Black., 628; 3 Wallace, 573; 26 Ga. R., 662; 37th, 620. The shares belong to the stockholders, and not to corporation: 9 N. J. R., 427; 3 Howard, 133, 150; 12 Hill & J., 117. Capital taxed relieves property from tax: 31 Curt., 106; 4 Scam., 304; 7 Blackford, 395. Capital taxed reserves fund not taxed: Sec. 7 Tax Act, March 6th, 1869; 31 Curt., 106;

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4 N. J. R., 442 ; 4 Paige, 399 ; 8 Ga. R., 500 ; 2 Wallace, 209 ; 4 Hill, 20.

WARNER, Judge.

This was a bill filed by the Augusta Factory Company against the tax receiver and tax collector of Richmond county, praying for an injunction to restrain the assessment and collection of a tax which the complainant alleges to be in violation of the existing tax laws of the State. The receiver assessed the capital stock of the company at \$162 00 per share on its six thousand shares of capital stock, as the *ad valorem* or market value of the stock, on the 1st day of April last. Whereas, the complainant alleges, that said Augusta Factory, being an incorporated company, was bound only to return and pay a tax on \$600,000 00, or \$100 00 per share on its six thousand shares. On hearing the application for an injunction, the same was granted by the presiding Judge, whereupon the defendants excepted. By the 15th paragraph of the 796th section of the Code, it is declared that "All owners of stocks in any incorporated company liable to taxation on its capital for such stock shall not be taxed as individuals." The 813th section of the Code declares that "the several railroads, and other incorporated or unincorporated companies of every kind, except banks, which are not exempt by their charter, or otherwise, or for which there is not a different method of taxation specially prescribed, pay the same rate *per cent.* upon the whole amount of their capital stock paid in as is levied on other capital." The question made by the record in this case is, whether the Augusta Factory, being an incorporated company, is bound, under the existing laws of the State, to pay a tax upon *the whole amount of the capital stock of the company paid in*, or whether the company is bound to pay a tax on *the market value* of that stock. To maintain the proposition contended for by the plaintiffs in error, we should have to interpolate into this

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section of the Code the words, "or the market value thereof," so as to make the section read, that the incorporated companies in this State pay the same rate *per cent.* upon the whole amount of their capital stock paid in, or *the market value thereof*, as is levied on other capital. The State was adopting a method of taxation as a *revenue measure*. Clearly, it was not the intention of the General Assembly, in taxing the whole amount of the capital stock paid in by incorporated companies, to adopt a *sliding scale*, that, if the incorporated companies were successful in the management of their capital, and thereby enhanced the value of their capital stock in the market, they should pay an *additional* tax upon that capital in consequence of the successful management thereof by the respective companies; nor was it the intention of the General Assembly that the tax on the whole amount of the capital stock paid in should be *abated*, if, by bad management or accidents, by flood or fire, or other casualties, the value of the capital stock of the respective companies should be *reduced* below its par value in the market. The intention of the General Assembly was to levy a tax on the whole amount of the capital stock paid in by incorporated companies, and to derive a *certain revenue* therefrom, and not a revenue dependent on *the fluctuations of the value* of that capital stock in the stock market. The State never contemplated such a *speculative* method of raising revenue as that, and has not done so. The wisdom of the General Assembly, in imposing the tax upon the whole amount of the capital stock paid in by incorporated companies, instead of the market value thereof, as a *revenue measure*, is practically illustrated by the fact that the capital stock of a large majority of the incorporated companies in the State will not sell for the par value thereof in the stock market, and if the construction of the law as contended for by the plaintiffs in error should be adopted the State would be the loser by it so far as her *revenue* is concerned. The law does not impose a tax on the *income*, or *profits* of the capital stock of incorporated companies, but on

the capital stock thereof paid in as *the property* of the corporation. The true construction of the law, as a revenue measure, therefore, is, that incorporated companies in this State pay the same rate *per cent.* upon the whole amount of their capital stock paid in as is levied on other capital, whether the companies are successful or unsuccessful in their respective enterprises, or whether their capital stock is above or below its par value in the stock market. It is true that the Constitution of 1868 declares "that taxation on *property* shall be *ad valorem*, and uniform on all species of property taxed." The capital stock of the Augusta Factory is *one species of property*, and the company is required to pay the same rate *per cent.* on the whole amount of their capital stock paid in as is levied and paid on *other capital*. The capital stock of the company, and other capital, is the same species of property, and the rate of taxation on both is the same, and is, therefore, a *uniform* tax on *that species of property* as contemplated by the Constitution. The Augusta Factory, an incorporated company, is only liable, under the existing laws of the State, to pay a tax on the whole amount of the capital stock of the company paid in, and not on the market value thereof.

The Augusta Factory Company is liable for the payment of all legal tax on the property owned by it, as a corporation, which is not included as a part of their capital stock, and constitutes no part thereof.

Judgment affirmed.

LOCHRANE, Chief Justice, concurred, but furnished no opinion.

McCAY, Judge, dissenting.

I agree with the majority of the Court that, under section 813 of the Revised Code, a corporation is only taxable "upon the amount of its capital stock paid in." Some verbal criticism may, perhaps, be made upon the language, leading to a

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different view, but the natural, common sense reading of the whole section, especially if the last clause (now repealed, but a part of the Act when passed,) be considered. Any other view would be very unfair to the corporation, since they would have been taxed upon their whole stock, and then, also, upon their net annual profits.

But, in my judgment, this section of the Code is not now of force, for the reason that it is inconsistent with the 27th section of the 1st Article of the Constitution of 1868. The last clause of that section is in these words: "Taxation upon property shall be *ad valorem* only, and uniform upon all species of property taxed." This section engrafts a new feature into our Constitution, and is, to my mind, clearly inconsistent with the section of the Code referred to.

A corporation, though a creature of the law, is, nevertheless, in many respects, a person. As the owner of property, of houses, and lands, and personal effects, it imposes precisely the same burdens on the State as do private persons. When section 813 of the Code became the law, the Legislature was under no restraint, as to its taxing power. It might tax property specifically, or *ad valorem*, at its pleasure, and it was not required by the Constitution to make the taxes uniform upon all species of property taxed. But the 27th section, Article I., of the Constitution, expressly limits the taxing power of the General Assembly. It can now lay no taxes upon property, except *ad valorem*, and all taxes must be uniform upon all species of property taxed. What does this mean? Clearly, that property shall be taxed according to its value, and that property in one person's hands, or in one part of the State, shall not be taxed differently from the same property in another person's hands, or in another part of the State.

The section of the Code under consideration is intended to tax the property of corporations. In perfect accord with its constitutional power, at the time, it assumes that every corporation has taxable property to the amount of its capital

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stock paid in. Sometimes this is true, but only sometimes. Very often its property is not nearly so large as the capital stock paid in. Corporations, like individuals, sometimes manage badly, or meet with misfortunes by flood and fire and fraud. Sometimes, directly the contrary is true. By wise investments and proper management, by fortunate appreciation of property purchased, and by other means, corporations are often worth more, a great deal, than the amount of capital stock paid in. More emphatically still is it true, that corporations often have possession of, and own, very large amounts of property beyond the capital stock paid in. In these days of credit and of bonds, it is a very common thing for large and small corporations to be the owners and managers of property built or bought upon credit, with very little capital stock actually invested.

Under this section of the Code, however, the property of the company may have decreased by losses, depreciation, or otherwise. However its property may have appreciated, or however it may have become the owner of property, by building, constructing or buying upon credit, but one rigid rule of taxation is to be applied. It is to be taxed according to the amount of capital stock paid in. If its stockholders have paid in \$100,000 00, it is to be taxed upon that sum, at the same rate, *per cent.*, as the property of other people is taxed. If its houses be burned, if its property has depreciated, or has all been squandered, it is still assumed to be the owner of \$100,000 00, of property, for taxation. If it has proved a success, and its \$100,000 00 has become \$200,000 00, or, what is more usual, if it is carrying on large operations on credit, has extensive buildings, or long lines of railroad built upon credit, it is assumed to be the owner of property to the amount of \$100,000 00. This is not, in my opinion, *taxing ad valorem*. True, the tax is to be a certain rate *per cent.*; but an arbitrary value is fixed, and the rate *per cent.* is laid upon that. One corporation is the owner of property worth \$100,000 00, another is the owner of property worth

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\$1,000,000 00. The stockholders of each have paid in \$100,000 00, and both are assumed to have that amount of taxable property, and the same rate *per cent.* being put upon it, at this assumed value, it is claimed that the tax is *ad valorem*.

I am not discussing the justice or propriety of such a mode of taxation, but its consistency with that clause of the Constitution which declares that all taxes upon property shall be *ad valorem*. When this section of the Code was adopted the Legislature might or might not, at its discretion, take this mode of ascertaining the taxable property of a corporation. Taking the State over, it may be that as much revenue would come in by this way as any other. It may be, too, that this mode of taxing corporations is not unjust. But, as I have said, this is not the question. Is it *ad valorem*, according to value? Is it, or not, inconsistent with the Constitution of 1868? It may be very just and fair, but if it is not *ad valorem* it is unconstitutional and void. Suppose the General Assembly were to say that all horses and mules shall be considered worth \$100 00, and one *per cent.* tax be laid on them, or that all land shall be considered worth \$5 00 per acre, and one *per cent.* tax be laid on it, would it not be absurd to say that this was a tax *ad valorem*? An *ad valorem* tax is one that depends upon the actual value of the thing taxed, and varies as that value varies. It must be remembered that the *stock* of a corporation does not belong to the corporation. The stock belongs to the stockholders. The corporation is an entity, an existence of itself, entirely different from its stockholders. The stock is an independent species of property. It may be bought and sold, and inherited. It may become the subject of litigation, and call upon the public for protection, and give it the same trouble as any other property, and this entirely independently of the property owned by the corporation. The stock may be worth but little, the property of the company much. Evidently, the section of the Code was not intended to tax the stock.

That belongs to the stockholders, and, generally, by our law, is not taxed. The intent was to use the amount of stock paid in as the measure of the value of the property owned by the company, and assess a *per cent.* upon the value thus fixed. This, it is clear to me, is not a taxing *ad valorem*.

Again, this section of the Code is inconsistent with the Constitution of 1868, in that the tax it assesses upon corporations is a violation of the provision that taxes shall be uniform on all species of property taxed. If this means anything, it seems to me that it prohibits taxing the same species of property one way in one person's hands, and another way in another person's hands. If a private person owns property by the general law, he pays tax upon it according to its value. It may be that he has paid nothing for it, or he may have paid for it more than its worth. He may be in debt for it, still he must pay tax on its value. A corporation is but a person. If John Doe and Richard Roe are taxed according to the value of the property they own, wholly regardless of what they have paid for it, and whether they have or have not paid for it, the law of uniformity requires that corporations shall pay tax upon the property they own in precisely the same way and by the same rule. In other words, as I understand the Constitution, corporations stand, as to taxes upon their property, just as do other persons. It is to be taxed *ad valorem*, and the rule that taxes are to be uniform on all species of property taxed is to be applied to corporations as well as to private persons. As a matter of course, these views do not cover cases where the Legislature, by contract, before this provision was inserted in the Constitution, had agreed with particular corporations upon some special mode of taxation. Even if it were competent so to do, I do not think it was the intent of the framers of the Constitution to abrogate any such contract, if otherwise binding upon the State.

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J. R. JONES, plaintiff in error, *vs.* J. W. LATHROP & COMPANY, defendants in error.

When certain foreign bills of exchange were drawn by the defendants, as the shipping agents and factors of the plaintiff, payable to his order, though not signed by the defendants as agents, but drawn by them upon the grounds of the sale of the plaintiff's cotton as his agents, and under his instructions, according to the known and usual custom of the trade in such cases, and not on their own account, they not having received any valuable consideration therefor from the plaintiff, as the drawers of said bills, and the plaintiff having received the bills so drawn without objection, and, by his conduct, with full knowledge of the facts, having ratified the acts of the defendants, as his agents and factors, in selling his cotton and in drawing the bills so as to enable him to receive the proceeds thereof, according to the usage and custom of the trade :

Held, That, under the facts of this case, the defendants were not individually liable to the plaintiff as the drawers of the bills, but acted merely as his agents and factors in drawing the same, and on his account, and not on their own account. McCAY, Judge, dissenting.

Bills of exchange. Agency. Before Judge SCHLEY.
Chatham Superior Court. January Term, 1871.

Jones brought "complaint" against J. W. Lathrop & Company on their five bills of exchange, each of which was as follows :

"Exchange for £200. SAVANNAH, July 9th, 1867.

"Sixty days after sight of this first of exchange, (second and third unpaid,) pay to the order of J. R. Jones two hundred pounds sterling, value received, and charge the same to account of Yours, etc.,

"J. W. LATHROP & CO."

"To Mr. ROBERT HUTCHISON,

"Liverpool, England."

The defendants pleaded the general issue, and that they drew the bills, not on their own account, but as Jones' agents, to get Jones' money from Hutchison, which he held as the proceeds of Jones' cotton, which Hutchison had received from

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them as Jones' agents, and had sold on Jones' account, and that Jones held the bills till Hutchison broke.

On the trial, after putting in evidence the bills, the following correspondence was read. On the 10th of April, 1867, Jones wrote defendants that he had instructed Rust & Johnston to ship certain cotton to them, "with the ultimate view of shipping it to Liverpool, which you have probably done before this time." He added, "If you think best for my interest to sell the cotton for foreign bills of exchange, you will please procure them, if possible, in small amounts," etc. And "when instructed by my factors in reference to the sale of the cotton, you will please at once write to me of your instructions from Messrs. Rust & Johnston, and of yours to your factors or partners in Liverpool, to whom you have shipped the cotton."

On the 21st of May, he again wrote them, saying, "In reference to the cotton shipped by you to Liverpool, for my account," to prevent misconstruction by "your factor or cotton merchant in Liverpool, you will instruct your factor in Liverpool," by telegram, to sell at once.

On the 31st of May, they wrote Jones that they were advised of the sale of his cotton, and would render an account of sales as soon as they received one. In reply, Jones wrote them, on the 15th of June, 1867, saying that if his cotton was sold for foreign exchange, or gold, first to make a separate statement of a part of the cotton, and send United States currency for that, sell enough exchange to pay expenses, and remit balance in \$1,000 00 amounts each, "as you receive the payments of the cotton," except any fractional amount, which he wished in United States currency.

On the 10th of July, they rendered him his account with them, and sent the said five bills, and certain United States currency to foot the balance due him. In it they advised him that these bills were fluctuating in value, etc., and said if he wished "to sell the bills, or any part of them, we will attend to it, if you desire." The account sent him, "J. R.



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Jones, in account with J. W. Lathrop & Company "gave him credit by "net proceeds in Liverpool; eighty-five bales cotton, £1,284.18.7, at 148, \$8,451 98," and balanced by expenses of said bills.

On the 6th of October, 1867, Jones wrote them that he wished to sell the sterling exchange, £5,000, "you procured for me last spring," and asked their advise as to market, etc. On the next day he wrote them that he had, before writing last, disposed of all the exchange but £1,000, and wrote £5,000 by mistake.

On the 8th of October they advised him of the state of the market, said they were willing to assist him in selling his exchange, and directed it sent to them. On the 10th, they acknowledged receipt of his letter of the 7th, and again made suggestions as to the state of the market. On the 20th, Jones wrote that he had sent the bills per express to them, and "am confident you will, in my interest, do the best you can for me in the sale of the bills," and gave them full discretion in the premises. He asked them to buy certain pork, and take its price out of the proceeds of the bills. On the 25th, they advised him that he had sent only the seconds and thirds of the bills, and that they could not be used without the firsts also. On the 28th, Jones forwarded the firsts, saying his omission was from ignorance of commercial usage, and told them when they sold to deduct their commissions and send him balance in United States currency.

On the 5th of November, they wrote him that, ten days before, there was a rumor that Hutchison was broke, which prevented sale of the bills; that, by later advices, they learned he had failed, because, as was supposed, of the failure of the Royal Bank of Liverpool, of which he was a director; saying that their letters of 19th from him gave no intimation of such thing, and it had surprised every one in Savannah who knew how he stood financially. On the 15th November, Jones replied, stating his surprise at the news, from what he had heard of Hutchison, saying, "the loss of the money will be

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a terrible blow to me, financially speaking. I feel very blue on the subject. You will keep me posted," etc. On the 12th, Jones wrote: "After some little reflection as to the *status* of the sterling bills, I have concluded to say to you, until further developments in reference to the condition of the bills, you will please send the sterling bills back to me, or a copy of them, for the present. Keep me advised as to the new developments in reference to them. On the 23d, he again wrote, saying he had not received the bills, or a copy, and saying, "if nothing by this time or by the 1st day of December next, should be heard satisfactory as to the full or partial solvency of the bills, please send them per express to me, with all information as to Hutchison," and closed with a promise to pay for the pork, which was to have been paid for out of the proceeds of the bills. Defendants put in evidence the account of sales rendered to them by Hutchison, which were headed as follows: "Accounts sales of eighty-five bales cotton, per Sullivan, from Savannah, sold by Robert Hutchison on account of J. R. Jones, Esq., per J. W. Lathrop & Company," and an account current headed "J. W. Lathrop & Company, in account current with Robert Hutchison," in which proceeds of Jones' cotton was placed to the credit of J. W. Lathrop & Company.

Lathrop testified that, about the 1st of February, 1867, they received the cotton from Rust & Johnston with no other instructions but to ship to their correspondent at Liverpool. Rust & Johnston knew Hutchison was their correspondent, and knew his standing as well as they, and that they had no house in Liverpool. They paid Jones in cash, etc., all proceeds of sale except said foreign bills, and that the above accounts current were received soon after the sales. They had no interest in the proceeds, and disposed of it as Jones directed. He testified that the bills were drawn according to the custom of merchants; that, according to such custom, the shipper here was but the agent of the owner of the cotton, and that Hutchison was undoubtedly good till about the 19th

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of October, 1867, and that they lost heavily by his failure. Several other witnesses testified, also, to Hutchison's high standing, the date and cause of his failure, the said custom of merchants, and how they, also, had lost by his failure.

Jones, in rebuttal, testified that he gave no instructions except what was in said letters, and authorized Rust & Johnston to give no other; that he made no complaint of anything done by defendants up to the time of sending back the bills for sale, and invested in the bills for political reasons.

The defendants waived all right of defense based upon the failure of plaintiff to present the bills of exchange, in suit for acceptance or payment, after the bankruptcy of Robert Hutchison had been ascertained.

After argument had been heard, the Court was requested, in writing, by the counsel for plaintiff, to charge the jury as follows:

1. That where an agent, having received special instructions from his principal in regard to any transaction, departs from such instructions, he makes himself personally responsible to his principal for all loss which may result from such departure; and that, consequently, should they (the jury) find, from the evidence, that the plaintiff directed the defendants to sell his cotton for foreign bills of exchange, and that the defendants have not, in effect, followed that direction, the plaintiff is entitled to a verdict.

2. That, to constitute a bill of exchange, two parties are absolutely necessary: the drawer and the drawee: Chitty on Bills, margin 24. And unless the bill be made payable to the drawer's own order, a third party, the payee, to whom, in the absence of any qualifying condition appearing upon the face of the paper itself, the drawer becomes responsible for the amount of the bill, in case it should be dishonored. And that, consequently, should they find that the plaintiff directed the defendants to turn his cotton into foreign bills of exchange, and that, in compliance with his instructions, the defendants sold his cotton and transmitted to him the bills in

suit, unaccompanied by any qualifying explanation, and that the plaintiff received the bills as being responsive to his order, it followed, as a legal consequence, that the defendants, as drawers, became liable to him as payee for the amount of the bills, in case they should be dishonored.

3. That, if the testimony discloses that the defendants were acting, in the sale of the cotton in question, as factors for the plaintiff, then, in return for "the peculiar confidence reposed" by him in them, the law required of them "greater and more skillful diligence" in carrying out his instructions and protecting his interests than had they been ordinary agents, "and the most active good faith:" Code, 2085.

4. That a bill of exchange, payable at or after sight, differs materially from a bill payable at a specified time, in the duty of its presentation for acceptance by the holder; that, while it must be presented within a reasonable time, there is no general rule of law defining what is such reasonable time, and that this question must be decided by the peculiar circumstances of each case, and depends very much upon the intention of the parties, drawer and payee, to the bill itself. That, consequently, should they find from the evidence that, at the time the bills in suit were sent by the defendants to the plaintiff, it was the *intention* of the plaintiff not to present the said bills promptly for acceptance nor yet to put them immediately into circulation, and that this intention was known to the defendants, and that they made no requisition or condition in regard to presentment or circulation, these circumstances bear upon the question of reasonable diligence on the part of the plaintiff, and must be taken into consideration by them: Chitty on Bills, 314, 315, Cap. 9; Bingham, 416.

5. That the right of defense by a drawer or an indorser of a bill of exchange because of *laches* by the holder in its presentation for acceptance and payment may be *waived*; that while in the case of an indorser such waiver must be express, in the case of a drawer it may be implied; and that, conse-

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quently, should they find from the testimony that, after the bills had been retained for a time by the plaintiff, they were sent by him to the defendants for the purpose of being put by them into circulation, and they made no objection to selling the bills because of the antecedent delay, but, on the contrary, actually offered them for sale, this fact is testimony from which a waiver may be implied : Chitty on Bills, Cap., page 573.

His Honor, referring to these requests *seriatim*, and declining to give each of them in form and manner as put, charged the jury as to each generally, in the following language :

1. If you find from the evidence that the defendants departed from the instructions of the plaintiff without justifying cause, and that the plaintiff suffered damage by reason of such departure, you will give to the plaintiff whatever damage he has sustained by reason of this failure to obey such instructions.

2. That while it is true, generally, that a drawer is liable on his draft upon its dishonor by the drawee, yet this principle must always be considered in reference to the relation of the drawee and payee. For instance, suppose defendant had been plaintiff's clerk drawing on funds of plaintiff under his instructions, the defendant would certainly not be liable to plaintiff on failure of payment by the drawee, simply because he was the drawer. Now, apply this principle to this case. If you find that defendant was merely the agent of plaintiff, acting under *his* instructions, and drawing on plaintiff's own funds, he cannot be liable because the draft was dishonored.

3. This request I give you in charge as good law, still, if defendant was plaintiff's factor he would not be liable, unless it has been shown that he did not act with the most active good faith.

4. This request necessarily assumes that the defendant was not acting in the capacity of agent for plaintiff. For, otherwise, it is, in my judgment, not applicable to this case. It

applies in a case of an ordinary bill of exchange, purchased by the payee from the drawer, and when the payee must exercise due diligence in presentation for acceptance or payment in order to hold the drawer, who stands in the relation of an indorser on a promissory note. I therefore charge you as requested, if you find that defendant sold these drafts to the plaintiff for value received. But if you find that the defendant was not a *drawer for value*, and was acting in obedience to instructions, and followed them out, the risk was on the plaintiff, and the defendant is not liable for the dishonor of these bills.

5. This request is based on the assumption that the defendant was a drawer for value. It assumes a contract in the beginning on the part of defendant to be liable in case the drawee failed to pay. If you find facts in proof which sustain this conclusion, then a waiver of diligence in presenting these drafts may be implied from the fact (if you find it) that defendants received the drafts without protest, to sell them. But I charge you that the law herein requested cannot apply to this case, if you find that defendant was an agent acting under instructions of his *principal*.

Having gone through with plaintiff's requests to charge, I now charge you further that, if the facts be (and this you are to find, *pro or con*, from the evidence before you,) that plaintiff shipped his cotton to defendant, and instructed him to ship it to Liverpool for sale, and the defendant obeyed instructions, and the plaintiff drew a part of the money, when he could have drawn it all, and elected to allow the amount of these drafts to remain in the hands of the *house* to which the cotton was shipped; and if you further find that that house was one of good standing, to which, at the time of shipment, no suspicion of any kind attached, and that defendant never had reason to suspect its solvency or integrity from the time of shipment to the failure of that house, so as to be in duty bound to put the plaintiff on notice that his funds were in danger of loss—if you find these facts, I charge you

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that the defendant is not liable for any part of plaintiff's loss. Even had the house of Hutchison failed before payment of any of the funds, the defendants would not be liable if the credit of that house was undoubted when the cotton was shipped under instructions, (if you find that such instructions were given,) and the defendants had not been guilty of *laches* in endeavoring to get the money for the sale.

I can see no difference between such a case and a case where a factor has sold a planter's cotton, and is ready to pay over the money, and the planter elects to take part and instructs the factor to place the remainder in a solvent bank, and the factor obeys the order, and then gives to the planter a check on the bank to draw the money when he may choose. If the planter sees proper to hold the check until the bank, solvent when the check was given, becomes insolvent, the factor cannot be liable because his name is to the check. The money was the planter's; he ordered it left in bank, and the check is signed by the factor in no other capacity than as his agent. The sixty days after sight does not vary the principle; for, when a man engages in commercial transactions in any place, he is bound, at his peril, to acquaint himself with the usages of trade and commerce. Local usages enter into commercial contracts. And should you find that it is the established commercial usage between Savannah and Liverpool, that exchange bills are drawn at sixty days' sight, and you find that plaintiff ordered bills of exchange, he was bound to know the usage regulating such exchanges, and ignorance of the law will not excuse him.

The jury found for the defendants. Whereupon, the plaintiff applied for a new trial, upon the following grounds: The Court erred 1st. In refusing to charge the jury in manner and form as first, secondly, thirdly, fourthly, and fifthly requested by counsel for the plaintiff. 2d. In using the following language, "While it is true, generally, that a drawer is liable on his draft upon its dishonor by the drawee, yet

this principle must always be considered in reference to the relation of the drawer to the payee. For instance, suppose defendant had been plaintiff's clerk drawing a fund of plaintiff's, under his instructions, the defendant would certainly not be liable to plaintiff, on failure of payment by the drawee, simply because he was the drawer. Now, apply this principle to this case. If you find that defendant was merely the agent of plaintiff, acting under *his* instructions, and drawing on plaintiff's own funds, he cannot be liable, because the draft was dishonored," instructed the jury as to a state of facts not proven by the evidence. 3d. In charging the jury as follows: "But if you find that defendant was not a drawer for value, and was acting in obedience to instructions, and followed them out, the risk was on the plaintiff, and the defendant is not liable for the dishonor of these bills," his honor instructed them as to a state of facts not proven to have existed. 4th. In intimating to the jury that the fifth request of plaintiff was based upon an assumption of facts which might not have existed, and that the bills of exchange sued upon differed from ordinary bills of exchange in this: that they, the jury, might find from the evidence that the defendants, in drawing them, were acting simply as agents for the plaintiff, and under his orders, when there was nothing whatever in the evidence to warrant such instructions. 5th. Because he erred throughout his charge in diverting, by his reasoning and his illustrations, the attention of the jury from the procurement and the transmission of the bills of exchange, and the offer and subsequent undertaking to sell them by the defendants, and fixing it upon the relationship existing between them and the plaintiff, as his agents, for the shipment and sale of his cotton, thereby misleading the jury as to the true issue before them, and applying to that issue assumptions of fact which had no foundation whatever in the evidence. 6th. Because the verdict was against the charge of the Court. 7th. Because the verdict was against the evidence. 8th. Because the verdict was against the law.

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The new trial was refused, and error is assigned on said grounds.

LYON, DEGRAFFENREID & IRVIN ; JACKSON, LAWTON & BASSINGER, for plaintiffs in error.

FLEMMING ; HARDEN & LEVY, for defendants.

WARNER, Judge.

This was an action brought by the plaintiff against the defendants as the drawers of five bills of exchange, dated, Savannah, 9th July, 1867, for two hundred pounds each, payable to the order of the plaintiff in London at sixty days after sight, and directed to Robert Hutchison, Liverpool, as the drawee thereof. The defendants pleaded that, in advancing these bills, they acted merely as the factors and agents of the plaintiff in shipping his cotton to Liverpool to be sold there, and that the bills were drawn by them upon the proceeds of the sale of the plaintiff's cotton as his agents, and under his instructions, according to the known and usual custom of the trade in such cases, and not on their own account, and that they had not received any valuable consideration therefor from the plaintiff as the drawers of said bills. It appears from the evidence in the record, that, at the time these bills were drawn, Hutchison, to whom the cotton was shipped and upon whom the bills were drawn, was of good credit and standing as a merchant, but before the bills were presented for payment he became insolvent. The evidence, on the trial, was quite voluminous, much of it being the written correspondence between the parties in relation to the sale of the cotton, and as to the sale of these sterling bills now sued on, which had been delivered to the plaintiff by the defendants. The jury returned a verdict for the defendants. A motion was made for a new trial on the grounds set forth in the record, which was overruled by the Court, and the plaintiff excepted. This action, it will be observed, is brought

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against the defendants as *the drawers* of these bills of exchange, and is not brought against them for any neglect of duty as *the factors and agents of the plaintiff*, and the question is, whether the defendants were liable to the plaintiff as such drawers of the bills of exchange under the evidence disclosed in the record. The general rule of the law is, that the drawer of a bill of exchange is liable for the payment thereof according to its tenor and effect to the payee named therein, and is founded on the theory that the drawer has funds in the hands of the drawee which he sells or assigns to the payee for a *valuable consideration*. Such is the general presumption of the law. But this original presumption of the law, as between the original contracting parties, may be rebutted and overcome by the facts of the case as between them. What are the facts of this case? The plaintiff had eighty-five bales of cotton, which he desired to have shipped to Liverpool and sold there, and to receive in payment therefor sterling bills, and for that purpose he sent his cotton to the defendants as his factors and agents in the city of Savannah. The cotton was received by the defendants on or about the 28th of January, 1867, who were instructed to ship the same to their correspondent in Liverpool for sale. In obedience to these instructions, the defendants shipped the cotton to Hutchison, their correspondent, who received and sold the same, rendering an account of the sale of the cotton to the defendants, dated, Liverpool, 5th June, 1867. This account of the sale of the cotton rendered by Hutchison is thus stated: "Account of sale of eighty-five bales cotton, per Sullivan from Savannah, sold by Robert Hutchison for account of J. R. Jones, Esq., per Messrs. J. W. Lathrop & Company." The cotton was not sold on account of the defendants, but on account of the plaintiff, and the proceeds of the sale was not the property of the defendants, but the property of the plaintiff. To enable the plaintiff to receive the proceeds of the sale of his cotton in the hands of Hutchison, the defendants' correspondent in Liver-

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pool, these bills were drawn according to the usage and custom of the trade in such cases, and were sterling bills in the commercial sense of that term. The evidence in the record shows that the usage and custom of the trade was to draw sixty days' bills, as was done in this case by the commission merchant in Savannah shipping the cotton, that it was the custom to put the proceeds of cotton sold at Liverpool to the credit of the merchant shipping, but the accounts at Liverpool showed to whom the cotton belonged, and no person except the merchant shipping the cotton could draw for the proceeds of the sale thereof who would settle with his principal to whom the cotton belonged ; that the accounts rendered in this case were according to the usage and custom of the trade. These bills, therefore, were, in fact, drawn by the defendants, as the shipping factors and agents of the plaintiff, to enable him to receive the proceeds of his cotton shipped by them to Liverpool, and sold there under his instructions, according to the usage and custom of the trade, and were not drawn by them in favor of the plaintiff for any *valuable consideration received by them from him therefor*. After these bills were drawn, and the account of sales of the cotton had been rendered to the plaintiff, the same were delivered to him who retained them in his possession nearly three months *without objection*, and in the meantime corresponded with the defendants as to the best time when to dispose of them at the highest rate of premium, as sterling bills, and finally transmitted the same to them to sell for him as his agents, when, in their judgment, they could realize the highest market value therefor.

As late as October 20th, the plaintiff wrote the defendants to purchase for him three barrels of pork, and deduct the price thereof from the sale of the bills of exchange, then in their hands for sale. After the defendants had informed the plaintiff of the failure of Hutchison, he wrote them, on the 8th November, "The loss of the money will be a terrible blow on me, financially speaking. I feel very blue on the subject.

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You will please keep me regularly advised of any new developments in the matter, and, *for me*, see what can be made out of the matter." Again, on the 23d of November, he wrote them, stating that, "if, by the 1st of December next, nothing satisfactory is received or heard from Mr. Hutchison, and you see no reasonable chance to make anything out of the bills for the present, or at an early day, to reimburse you for the pork sent to me, I will remit the money to you for the pork." It is quite apparent that, up to that time, the plaintiff did not consider the defendants were personally liable to him as the drawers of these bills, and he then had full knowledge of all the facts.

The relation of principal and agent arises whenever one person expressly, or by implication, authorizes another to act for him, or subsequently *ratifies* the acts of another in his behalf: Code, 2152.

The form in which the agent acts is immaterial; if the principal's name is disclosed, and the agent professes to act for him, it will be held to be the act of the principal: Code, 2169. The plaintiff's name was disclosed by the defendants as the owner of the cotton, when shipped to Hutchison by them, as the agents of the plaintiff, and the account was rendered as the proceeds of the sale of the plaintiff's cotton, according to the usage and custom of the trade, and not as the defendants' cotton. The agent's authority will be construed to include all necessary and usual means for effectually executing it: Code, 2170. According to the evidence in this case, the drawing these bills by the defendants, as the factors and shipping agents of the plaintiff, was the necessary and usual means to enable them, as such agents, to obtain the proceeds of his cotton in sterling bills. Where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to *whom* the credit is given, is a question of fact, to be decided by the jury in each case: Code, 2185. As between the defendants and the plaintiff, their agency in the shipment

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of his cotton to Liverpool, and the procuring sterling exchange for the proceeds thereof, according to the usual custom of the trade, was well known to him, and the question whether the plaintiff received the bills from them, on their credit, as the drawers thereof, or on the credit of the proceeds of his own cotton, shipped and sold by them in Liverpool, as his agents, was a question to be decided by the jury, under the evidence in the case. Whatever might have been the liability of the defendants, as the drawers of these bills, if the same had been negotiated and in the hands of a *bona fide* holder for value, it is not necessary to discuss in this case.

The main, controlling question, as presented by the record, is, whether the defendants are personally liable to the plaintiff as the drawers of these bills of exchange, under the facts and circumstances of the case. In our judgment, they are not, and as there is no material error in the charge of the Court to the jury, or in refusing to charge as requested, and the verdict being right, under the law applicable to the facts of the case, we are of the opinion that the judgment of the Court below should be affirmed.

Judgment affirmed.

LOCHRANE, Chief Justice, concurred, but wrote no opinion.

MCCAY, Judge, dissenting.

1. I do not concur with the majority of the Court in their judgment in this case. Under the evidence, I think Lathrop & Company liable to Jones on these bills, and that the Court erred in his charge to the jury, suggesting to them that Mr. Lathrop was no more liable on these drafts, if he was Jones' agent, than if he had drawn them as the clerk of Jones. If Lathrop & Company were only the agents of Jones in *drawing the drafts*, this would, perhaps, be true; but the charge was calculated to mislead the jury, because the fact of Lathrop & Company's agency for Jones in the *shipment*,

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sale, etc., of the cotton was undisputed. The question was as to the agency in *drawing the drafts*. The former agency might exist, and not the latter. This was the whole point of the case. The charge of the Court was too broad. Under the circumstances, the jury might have understood the Court to hold that Lathrop's agency in the shipment of the cotton and the procurement of its sale was intended.

2. Under the proof, I am of opinion that, in the drawing of these drafts, Lathrop & Company were acting for themselves and not for Jones, and that they are liable to him as drawers. The proof is conclusive, to-wit: the evidence of Mr. Duncan. Mr. Lathrop himself and others swore that the account upon which these bills were drawn was the account of Lathrop & Company, not Jones.

Mr. Lathrop testified that, at the beginning of the season, he had a credit with Hutchison for £10,000. It is clear, from the statements of the witnesses, that Jones' cotton, when sold, was carried to the *credit* on Hutchison's, on the books of Lathrop & Company, that Hutchison would not have recognized a draft drawn by Jones, and that a draft drawn by Lathrop & Company in favor of *anybody else* than Jones would have been a *perfectly legitimate* draft, as the accounts stood, and as was usual with merchants. It was in proof that the interest on any balance there might be in Hutchison's books to Lathrop's credit went to Lathrop. It is clear, from the testimony, that no change would have been required *on Hutchison's* books if Lathrop & Company had paid Jones the money for his cotton, and drawn these drafts in favor of *some one else*. Indeed, that was proven to be the usual course of business. Planters rarely want drafts of foreign houses. Ordinarily, the commission merchant at Savannah pays the planter the money, and sells the exchange. Who can say that the very funds for which Jones' cotton sold was not paid by Hutchison to some *other draft* of Lathrop? It appears that Lathrop did a large business with him, was constantly shipping planters' cotton to him, having the pro-

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ceeds carried to *his own credit*, and selling exchange to any *purchasers who might* want it at sixty days after sight, upon the fund. In my judgment, the proof is conclusive on this point. The fund on which these bills were drawn was the fund of *Lathrop & Company*. It was to *their* credit on Hutchison's books, they were authorized to draw, and did draw on it, in favor of anybody they pleased. The interest on the money and the rise and fall of exchange was theirs. Had they been short with Hutchison the credit arising from the sale of this cotton would have gone to pay their debt to him. In other words, according to the course of dealing between Hutchison and Lathrop, the account on Hutchison's books, against which these bills were drawn, was constantly and regularly considered by Hutchison and Lathrop & Company as the account of *Lathrop & Company*. When the balance was large in his favor he was able to sell large sums of foreign exchange, and when it was small he had little to sell. Nothing is better settled than that a factor who sells goods for a third person, and mingles the proceeds with his own funds, as by a deposit to his general account in bank, is liable for what may happen to the funds.

This Court, at this term, in the case of *A. C. Wiley & Company vs. Burnet & Rixey*, held that a factor who sold his client's tobacco for Confederate money, and mingled the money with his own funds, was liable for the value of the money at the time, notwithstanding he always had on hand a plenty of Confederate money to pay. The ground upon which this decision went, was the acknowledged rule that a factor who mingles his principal's money with his own is liable for it, no matter what happens to the general bulk; since, by this act, he has made it impossible to separate the fund of the principal and his own fund. The evidence in this case shows, as I think, conclusively, that the proceeds of the cotton was carried to Lathrop & Company's credit, by the usual course of dealing, to which Lathrop & Company gave their assent; that it went to *swell their credit with Hutchison*, and was, to

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all intents and purposes, *as much in use* by Lathrop & Company as their *own fund*, on which they could and did draw and sell bills in the market, as though they had deposited every dollar of it with Hutchison, with their own hands. It was their own money, in their own power, to their own credit, in their own use, from the day on which the cotton was sold, and, in all probability, when the *drafts were drawn*, it had been paid out to their order. They *owed* Jones this money. They were not mere bailees of it. And they drew these drafts, signed by themselves, *as drawers*, payable to *Jones' order*, in payment of it. No man, in his senses, not *intending* to be liable, *as drawer*, would have put his name to such drafts. Jones could, the next day afterwards, have put them on the market as ordinary bills of exchange, in which case the liability of Lathrop & Company would have been unquestionable. This very fact, that Lathrop & Company, old merchants and dealers in exchange, put their names, as drawers, without qualification, to negotiable bills, in favor of Jones, is almost conclusive that they *intended to be liable* on them. True, as between Jones and them, the truth may be inquired into. But the fact of their signature to drafts, which they knew Jones intended to sell, and which they proffered to sell for him, is utterly inconsistent with the idea that they did not *intend* to be liable as ordinary drawers.

There is nothing in this evidence to show, or to justify the inference, that any of the parties, either Jones, Hutchison, or Lathrop & Company, considered the proceeds of the cotton in Hutchison's hands the property of Jones. The witnesses all say that it was not subject to the draft of Jones. True, it does appear that the books of Hutchison would, by the course of dealing, show that the cotton from which the money came belonged to Jones. But, by all the witnesses, it is shown that, by the course of the trade, it was on the books to Lathrop & Company's credit, and was treated, by both Hutchison and Lathrop & Company, as belonging to the latter. Suppose Lathrop & Company, when they made out

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this account between themselves and Jones, in which they charged themselves with the proceeds of the cotton, and credited themselves with these bills, and the exchange on them, to balance, had taken the ordinary course. Suppose they had paid Jones the money, and drawn and sold these drafts in the market, payable to somebody else, and they had proven unavailable by Hutchison's failure, would Jones have been liable to pay back the money? Lathrop & Company would be his *agents* in one case as much as the other. The fund drawn upon would be the same in both cases, and Lathrop's character would remain the same. If he drew on Jones' fund, and the fund failed, Jones would be liable over to Lathrop & Company. If this be so the liability of planters, shipping cotton to Liverpool, to consignees selected by the sea-coast merchants here, is a dangerous business.

This case, I think, turns upon the character in which Lathrop & Company acted in drawing the drafts. The question of negligence in presenting them arises, it is true, but the proof is so strong of acquiescence in the delay, that, on this point, there is little difficulty. By the settled rule in such cases, the draft must be presented in a reasonable time. What is a reasonable time, depends on the facts of each case, and upon the intent of the parties. The evidence is clear that it was known and understood by Lathrop & Company that they would not be presented for a while; and, by their letters, they clearly so advised, and I do not think, under the law, the jury would have found for the defendants, in this point.

The State of Georgia vs. Bradford.

THE STATE OF GEORGIA, plaintiff in error, vs. J. J. BRADFORD, sheriff, defendant in error.

Where a sheriff, in answer to a rule calling upon him to show cause why he had not made the money on a *fi. fa.* issued by the Comptroller General against a defaulting tax collector, showed, for cause, that the defendant had no property on which to levy the *fi. fa.*, and in a traverse of the return it appeared that the defendant was in possession of a tract of land which had been set apart as a homestead for the benefit of his wife and family :

Held, that there was no error in the Court in refusing, under the circumstances, to make this rule absolute, as the sheriff appears to have acted in good faith, and the property was real estate :

Held, also, that it was the duty of the Court to have directed the sheriff, by order, to levy upon the property, that the parties may have an opportunity of testing, before the Courts, whether the homestead so set apart, is or is not subject to an execution by the Comptroller General against a defaulting tax collector. WARNER, Judge, dissenting.

Tax. Homestead. Rule against Sheriff. Before Judge JOHNSON. Muscogee Superior Court. January, 1871.

This was a rule against Bradford, sheriff,. The cause was submitted to the Court upon the following agreed statement of the facts :

On the 1st of June, 1869, the Comptroller General of Georgia issued an execution against one Brooks, a tax collector, and his securities for \$5,100 00 taxes due said State. On the 10th of Janury, 1870, this execution was handed to Bradford for collection out of Brooks, the Governor having suspended proceedings against the securities. The sheriff did not make the money, and to a rule against him answered that Brooks had no property subject to said *fi. fa.* The answer was traversed by averring that Brooks owned certain lots described in the traverse, worth \$2,500 00. Issue was joined upon the traverse. But counsel agreed that when said execution was issued Brooks owned said land in fee simple, but on the 21st of August, 1869, said land was, by the Ordinary of said county, set apart to the wife of Brooks under the Homestead Act. It was submitted whether this land was

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subject to said *fi. fa.* The Court held it was not subject and discharged the rule against the sheriff. That is assigned as error.

C. J. THORNTON, Solicitor General for the State, said the *fi. fa.* was for *taxes*, and therefore the homestead was subject.

BLANFORD & THORNTON for defendant.

McCAY, Judge.

1. We think it would be a harsh judgment against the sheriff to hold him liable to a rule absolute in this case. He has acted in good faith and he has done no harm, except to compel by his conduct the plaintiff to ask the direction of the Court in this a very doubtful matter. He is made a trespasser if he levies upon a homestead. It is admitted that there is a homestead in this case; but it is contended that the homestead is exempt for taxes, and that this *fi. fa.* is for taxes. Because the sheriff refused to decide so nice a question as this it seems to us that it would be very harsh to hold him liable.

We are not, ourselves, prepared to say that this property is liable. It is an open question, and one that the parties have a right to make. The *fi. fa.* is for the default of a tax collector in settling with the Comptroller General, and it is going pretty far to say that this is taxes, in the sense of the exception to the Constitution. We do not, however, decide this question. We simply say that, in our judgment, in so doubtful a case, the sheriff, in the case of real estate, may well await the order and direction of the Court.

2. We think the Court should direct the levy to be made. Let the parties claim the property, and make the question.

LOCHRANE, Chief Justice, concurred, but furnished no opinion.

WARNER, Judge, dissenting.

This was a rule against the sheriff, calling on him to show cause why he had not made the money on a tax execution issued by the Comptroller General of the State against Brooks, a defaulting tax-collector, and his securities. The sheriff showed for cause, that there was no property of Brooks to be found, on which to levy the execution. The return of the sheriff was traversed, and the following statement of facts was admitted, and submitted to the Court for its judgment, to-wit: That on the 1st day of June, 1869, the date of the execution, Brooks, the principal defendant therein, was the owner, and in the possession of part of two lots of land, of the value of \$2,500 00; that on the 21st day of August, 1869, said land was set apart to the wife and children of Brooks, as a homestead. After argument had, the Court discharged the rule against the sheriff, and the Solicitor General for the State excepted. By the 915th section of the Code, the property of tax collectors is bound from the time of the execution of their bonds. The record does not show the date of the tax collector's bond, in this case, but as the execution against him, as such tax collector, was issued on the 1st June, 1869, he must have executed his bond prior to that date. The homestead was set apart on his land, to his wife and children, on the 21st day of August, 1869. By the Constitution of 1868, and the Act of the General Assembly of that year, ministerial officers are *not prohibited* from enforcing executions for *taxes* against the homestead; executions for *taxes* are expressly excepted by the Constitution and the Homestead Act, and it was the duty of the sheriff to have levied this tax execution on the homestead set apart on his land for his wife and children, as the property of the defendant therein, inasmuch as it is not exempt from levy and sale for taxes, under the provisions of the Constitution and the Act of 1868, as a homestead. The fact that a homestead is claimed on the land of a defendant in a tax execution, is

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no legal excuse or protection to a sheriff who fails or neglects to levy an execution for taxes thereon ; the more especially, as the land was bound for the payment of the tax execution, before the homestead was set apart on it.

C. B. WELBORN, plaintiff in error, vs. WARREN AKIN, defendant in error.

1. Where it appears, from the record that A. sued W. upon a promissory note, dated in 1868, and that W. had filed his plea under oath; that it was given in renewal of a contract, made before the 1st of June, 1865, and the Court called the case out of its order on the docket, under a rule by which he disposed of cases in which no issuable defenses were filed under oath, and against the objection of W., heard the argument on the plea, and dismissed it upon the ground that the Act of 1870 was unconstitutional :

Held, That the Court erred in dismissing the plea upon this ground. The law of 1870 is not *ex post facto*, for that applies to criminal, and not civil cases. The requirement that an affidavit be filed, that taxes due the State thereon have been paid, does not render it unconstitutional. If no tax was due, the law imposes none, and if the tax was due, creditors are not a favored class to be exempted from the payment of their legal taxes. The parliamentary law said to be violated, and, by it, the constitutional provisions for the passage of laws, does not operate to render it unconstitutional. Acts of the Legislature are presumed to be constitutional, and Courts will not declare them void, except in clear and urgent cases. It does not impair the obligation of contracts, for the law does not alter, modify or change a word in it; nor does it impair the remedy, but both stand untouched by the law, and the requirement of the payment of tax due on the contract, neither impairs the obligation of it, nor denies the remedy; and the fact presented by the plea, that the note sued on was given in renewal of an old debt, due before 1st June, 1865, if denied, was an issuable defense; if not denied, it stayed judgment until the law was complied with, and if denied, it was a fact to be tried by a jury.

2. When, on the motion to set aside a judgment made in the case, it appears that the note was given in settlement and consideration of a claim held, and a judgment transferred upon a third party, and was not within the provisions of the Act of 1870, while we hold the Court erred in dismissing the plea, still, by the facts, when it appears no in-

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jury was done to the defendant, and his facts set up sufficient to show the judgment would not be changed by a new trial and reversal, a new trial will be refused.

Relief Act. Constitutional law. Renewal. Novation. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

In January, 1871, Akin sued Welborn upon his promissory note, made in 1868. Welborn pleaded that said note was given in renewal of one made prior to June, 1865; that he lost \$2,000 00 by the destruction of his property, in consequence of the late war with the United States, and claimed the benefit of the Relief Acts. Akin called the Court's attention to the case, and asked to take it up. It was very far down upon the docket from where the Court was engaged. But the Court usually allowed cases, in which no issuable defense was filed, to be called at any time. Welborn's counsel said the case was called out of its order. Akin said it was not, because said plea was not an issuable defense. Welborn's counsel said they were not ready to argue that question, because the case was not in order. The Court took up the case.

Welborn's counsel objected to Akin's proceeding, because he had filed no affidavit that he had paid the taxes on said claim, as required by the Act of 1870. Akin replied that said Act was void, and moved to strike the plea on that ground. The motion was sustained. The Court then asked Welborn's counsel if they had any other defense. They replied that, believing said plea would prevent a trial for some time, they had not inquired as to any other defense. Then the Court rendered judgment for Akin, for the amount due on the note.

During the term, Welborn moved for a new trial, upon the grounds, that the Court erred in each of said rulings, and because he had a valid defense to said action. The defense was this: This note was given in settlement of a claim which

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Akin held against him, as indorser, and also of the transfer of a *fi. fa.*, which *fi. fa.* he then thought valid, and Akin said it was, but, in fact, it was dormant, and therefore lost its lien upon the property of the defendant. therein.

Welborn's counsel made affidavit that they did not know this fact till after the judgment. Akin said this statement of Welborn was false, and that Welborn was in *laches* for not so pleading before judgment. And he introduced evidence to support his declaration, that the *fi. fa.* was no part of the consideration, but was, in fact, Welborn's property, sued out in his name, at Welborn's instance, etc. The Court refused a new trial. All this is assigned as error.

OLIN WELBORN; A. W. HAMMOND & SON, for plaintiff in error.

HILL & CANDLER; W. AKIN, for defendant.

LOCHRANE, Chief Justice.

This was an action brought by Warren Akin against C. B. Welborn, upon a note for \$1,602 15, dated December 16th, 1868, with a credit of \$42 33, September 14th, 1869. When this case was called upon the docket, counsel for defendant objected to its being taken up out of the regular call of the docket, "upon the ground that an issuable defense had been filed under oath under the provisions of the Relief Act of 1871; and that, not expecting said case to be disposed of until reached on the regular call of the docket, he was not then prepared for the argument and trial of the issues raised by said plea." This objection the Judge overruled and went on with the case, and this constitutes the first exception and assignment of error.

Defendant's counsel further objected to any further proceedings being had, on the ground that said cause was not ready for trial, because no affidavit, as required by law, had been filed under the 12th section and other sections of the

Relief Act of 1870, which was overruled by the Court, and forms the second exception in this case.

The plaintiff then moved to strike defendant's plea because the Act was unconstitutional, which the Court sustained, "and ordered the plea to be stricken on said ground," which was excepted to.

The Court inquired if there was any other defense. It was answered that, expecting the defense filed to be sufficient, and that the case could not be reached upon a regular call of the docket, he had not consulted his client and did not know. Plaintiff stating there was none, the Court granted the following judgment :

"There being no issuable defense filed on oath in this case, judgment is rendered in the cause for the plaintiff's defendant for \$1,602 15, as principal, \$116 44, as interest, and for costs of suit." 7th November, 1870.

At the same term of the Court, a motion to set aside the judgment was made upon several grounds, and an answer to the rule *nisi* made by plaintiff. After hearing the question, the Judge refused to set aside the judgment, and this is excepted to and assigned as error.

1. The first ground of error which we will notice is the manner in which the Judge disposed of this case and the plea filed. If the plea filed was not sufficient to have invoked the interposition of a jury, then the manner of calling the case, as certified to by the Judge, was not error. In disposing of the business of the Court, the rule laid down was a commendable one, the only question being whether the Judge was right in not regarding the plea as a defense to this action. Let us first examine the plea :

"And now comes the said defendant by his attorney, Hammond & Welborn, and says that the note sued on in this case was given in renewal of a contract made prior to the first day of June, 1865, and this he is ready to verify. Defendant further says, that in consequence of the late war against the United States, he suffered losses to the amount of

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\$2,000 00 by the destruction of property, and this he is ready to verify," etc. This plea was sworn to and filed in proper form.

This plea was intended, by the pleadings, to put in issue the rights of the parties and their respective equities, under the Relief Act of 1870. It was sworn to, and, by its face, presented the fact that the note sued on was in *renewal* of a contract made before 1st June, 1865. The regularity, therefore, of this proceeding, in holding this to be no plea, was based, as the Judge declares it, upon his idea, that the Act itself was unconstitutional. Under the law of 1870, the plea put in issue, under the oath of the party, the fact that this note was given in renewal of a contract, made before the 1st June, 1865. If it did, then what consequences followed it, under the law? Why, that it was the duty of the party claiming a judgment upon such contract, to show the Court that he had paid the legal taxes required. If it was a debt upon which tax was not due, or if, in fact, it was not a renewal, *the Court* could not decide the latter question, of his own motion, for facts put in issue may have properly invoked a trial by jury. It is evident that the Court, in this case, treated the Act of 1870 as a nullity—as no law—and, in striking defendant's plea, it is so recited as the ground of his judgment. This Court has held one provision of that Act constitutional, and we need not reiterate the views and reasons which have induced the Court to that conclusion. Suffice it to say, we have held that it was within the Constitutional powers of the Legislature to exact from plaintiffs, before they invoked the powers, processes and aid of the Courts, to pay their taxes due the State. The contracts upon which the suit was instituted, is not impaired by any direct legislation. It is left just as it was. All that the law requires of the plaintiff is to pay his debt due the State. This seems to be as reasonable that he should pay his debt, as that others should pay their debts to him. We cannot see why it

is unconstitutional for him to pay, if it is constitutional to make his debtor pay.

But it is said that the Act requiring an affidavit that the taxes due have been paid, is *ex post facto*. The clause of the Federal Constitution relating to *ex post facto* laws, applies to criminal laws only, is the language of the Supreme Court of the United States, in 17 Howard, 284. And in 16 Georgia Reports, 102, Judge Lumpkin says the phrase, *ex post facto*, in the Constitution, extends to *criminal* and not to *civil* cases. As this law inflicts no punishment, and is not a penal law against crime, it is useless to discuss the proposition. If the question be raised that it is retrospective in its operation, then our laws abound with retrospective statutes, and Judge Lumpkin recites a good many in the decisions, in 16 Georgia, "imposing penalties upon banks refusing to redeem their notes on demand, in specie," giving priority to the payment of debts due *cestui que trusts*, whether the trust debt was contracted *before* or *after* those due other creditors, and others which, he says, "have been adjudged to be constitutional by the Courts," etc. Thus we see, without multiplying authority, that retrospective acts, even imposing penalties, are not to be regarded as *ex post facto*, and thus this objection falls upon the authority of the Supreme Court of the United States, and this Court.

Again, it is argued that, as no affidavit was required at the time the note was made, it is unconstitutional now to impose this duty. In Bell vs. the Corporation of Vicksburg, an affidavit, required by the Statutes of Mississippi to a plea, which applied to debts or contracts entered into before the statute was recognized by the Supreme Court of the United States as valid and binding, and a demurrer to a plea filed without the affidavit, was held to be bad. Thus, the requirement of an affidavit was, by Judge Campbell, one of the *ablest* jurists who ever adorned the Supreme Bench of the United States, not regarded any unconstitutional requirement.

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There is nothing literally objectionable in the direction of the Legislature.

Now, it is a demonstration that the Act is not *ex post facto*, and that requiring an affidavit to be made, not required by the law at the time of the contract, is constitutional. Is there anything in the thing required to make it so? The law requires an affidavit that the taxes have been paid. If it be true that the contract was liable for tax at the time it was made, then why should it be unconstitutional to require an affidavit that it has been paid? If it owed no tax, the law imposes none; if the tax has been paid, the law interposes no obstacle. If it has not, why should *creditors* be a favored class, and exempted from the payment of tax. But, it is said, it is class legislation, and therefore unconstitutional. It applies to all contracts and creditors within its provisions and exceptions. The argument is, it does not operate equally. This is no argument, for it is imposing no tax, and the law may except those the Legislature pleases from paying it. This is a clear constitutional power; besides, this doctrine of all taxes being unconstitutional that do not apply to all equally, is exploded. Cotton was taxed, and the argument was made that the tax on it was unconstitutional, because it bore on one section, and not equally, but taxes on manufactures, only carried on North, would, upon the same principle, fall within the same objection. I see nothing in the points made with such earnest argument.

But it is said again, that it is unconstitutional because of the manner in which it was passed—by substituting the Senate bill for the House bill, and therefore reading the bill as passed but once in the House, (R.)—and we are invited to review parliamentary law. In reply to these objections, I only reply in the language of Judge Lumpkin: “I need not repeat here what has often been declared before by this Court, that Acts of the Legislature are not only presumed to be constitutional, but that the authority of the Courts to declare them void will never be resorted to except in a clear

and urgent case, one which is directly in the teeth of the Constitution, as if the Legislature were to vest the executive power in a standing committee of the House of Representatives, one which requires no nice critical acumen to decide on its character, but which is as obvious to the comprehension of any person as an axiomatic truth, as that all the parts are equal to the whole, or that two and two make four."

The illustrations given are the strongest utterances of the necessity of the case, its overwhelming clearness, no doubts, no sifting of parliamentary rulings or legislative rights, but as plain as two and two make four.

But it is argued that it is unconstitutional because it impairs the obligation of the contract. How paying taxes due the State upon the contract is impairing it is beyond my comprehension. It is certainly not as clear as two and two make four. What was the contract? That Welborn should pay a certain sum of money to Akin. The law is, that Akin shall make an affidavit that he has paid the legal taxes due the State, before he takes judgment against Welborn. A statute abolishing imprisonment for debt does not impair the obligation of contracts although applying to debts then subsisting; it affects the remedy only. Statutes of limitation applying to debts subsisting, are constitutional.

In *Satterlee vs. Matthewson*, 2 Peters, Justice Washington, delivering the opinion, recognizes the power of the Legislature, in a case greatly stronger than the one at bar. In that case, by an Act, it made valid what before was void; it created a contract where none before existed; it made one a landlord and the other a tenant; and, out of these relations, applying to suits pending, it took away Satterlee's defense; and the Judge states, in his decision, that the Supreme Court of Pennsylvania, in 1825, had held the contract entered into with a person claiming under a Connecticut title void, and the Legislature, afterwards, in 1826, in the teeth of the decision, declared contracts of that nature valid. "Now, (says this Court,) this law may be censured, as it has been, as an

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unwise and unjust exercise of legislative power, as retrospective in its operation, * * * as creating a contract between parties where none previously existed. All this may be admitted, but the question we are considering is, does it impair the obligation of the contract between the State and Wharton, or his alienee." And the Court held the Act not repugnant to the Constitution of the United States.

Now, in this case, the law does not touch, nor pretend to touch the contract between Akin and Welborn. It stands as it was written, without the crossing of a *t*, or dotting of an *i*. It is neither added to, nor diminished. It stands as it was written, and the only thing done, by the provisions of the Act, under consideration, is not to the contract, but outside of it. The process of the Court is not denied; the enforcement of the contract not refused. The simple thing to be done is to pay the tax due the State, discharge this obligation to the State, arising out of the contract, and then the Courts are ready and open to grant the judgment against Welborn. If no tax is due, the creditor must say so. If the tax has been paid, he must say so. If it has not, he must pay it, and the contract will be enforced by every remedy known to the law. In this case, the contract clearly is untouched.

Now let us see what is changed by the tax provision of the Act of 1870. The remedy is not altered. There is nothing touched in the provision of the remedy. It remains the same, as well as the contract. The simple, naked proposition of the law is, pay your tax, if you owe it. This is the language of the law. The law will not affect either the contract or remedy, but require the creditor to pay tax, before he uses the Courts. Courts are maintained by taxation, and the requirement upon the creditor is, pay what you owe the State, before you take your judgment to compel her citizens to pay you.

But it is objected that, as this law is for the collection of revenue, then it is unconstitutional, on two further grounds:

1st. The title of the Act embraces two distinct subject matters; and, 2d. This Act, if to raise revenue, originated in the Senate, and not in the House of Representatives. We do not think there is any force in either of the objections. The Act, by its title, refers to one subject matter. The revenue is an incident to the main purpose of the Act, and this answers the other objections; for many laws result in revenue, that are not purely Acts to raise revenue. This law purports to impose no tax. It provides for how creditors may use the processes of the Courts. The incidental advantage accruing to the debtor is consistent with the spirit of the law, as well as its letter.

Now, this plea presented the fact that the note sued on was in renewal of an old debt, due before the 1st June, 1865. It, therefore, presented what, if denied, was an issuable defense. If it was not denied, it stopped judgment until the Act was complied with. If it was denied, it was a fact for the jury to determine, and in either view of it, we think the Court erred.

Upon examination, however, of the facts presented by the record, it appears, in the motion, that the note sued on was given in settlement of a claim, which the plaintiff held against the defendant, and also the transfer of an execution, held by him upon Hamilton. From this statement, it is apparent that this note was not given in renewal of a debt, within the provisions of the Act of 1870, and while we think the Court erred in striking the plea, still, by the facts shown in the motion, we do not hold that the Court should set aside the judgment, when we hold the judgment, under the facts, to be valid, and we, therefore, upon this ground, affirm the judgment in this case.

WARNER, Judge, concurring.

I concur in the affirmance of the judgment of the Court below, on the ground, that the Act of 1870, requiring an af-

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fidavit of the payment of taxes on all debts contracted prior to the 1st June, 1865, as a condition precedent to a recovery by suit thereon in the Courts of this State, is unconstitutional and void.

McCAY, Judge, concurred, but furnished no opinion.

CONNALLY & BROTHER, plaintiffs in error, vs. PECK & BOWMAN, defendants in error.

The 5th section of Act 28th, October 12th, 1870, which authorizes a defendant in a *fi. fa.* to deny under oath the plaintiff's affidavit that the taxes due upon the debt had been paid, and providing that the issue thus made shall be returned and tried as other affidavits of illegality, stands upon the same footing as the first and second sections of the Act, and is not unconstitutional. WARNER, Judge, dissenting.

Relief Act of October, 1870. Constitutional law. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Peck & Bowman had a *fi. fa.* against Connally and Brother levied upon defendants' land. They made affidavit, on 11th April, 1871, that said *fi. fa.* was proceeding illegally, because it was founded upon a debt contracted prior to June, 1865, and plaintiffs had levied it without having made an affidavit that they had paid all legal taxes due on said debt as required by the Relief Act of October, 1870. The sheriff returned the papers into Court then in session. Plaintiff's counsel asked the Court to order the sheriff to proceed in spite of said affidavit. Defendant's counsel objected that the illegality was returnable to the next term of the Court, and could not be sooner heard. The plaintiff's counsel rejoined that said affidavit was a nullity because said Act was unconstitutional. Upon that ground the Court ordered the *fi. fa.* to proceed. This is assigned as error.

COLLIER & HOYT for plaintiffs in error.

A. W. HAMMOND & SON for defendants.

McCAY, Judge.

We are unable to see any reason why, if this Act is constitutional, as applied to actions pending, it is not equally so as to judgments and executions. There is the same propriety for saying to the owner of a judgment, you shall not proceed upon it until you pay to the State the taxes you owe upon it, as there is in saying to a plaintiff in a pending suit, you shall not have a judgment until you pay the taxes.

Indeed, it seems to me there is less objection to the law as applied to judgments; no time is fixed. The plaintiff can proceed whenever he makes the affidavit. If he is not ready to make it to-day, if he cannot make it, it is in his power to qualify himself by paying the taxes and to make it whenever he gets ready.

As we have construed this law, to-wit: that it only denies the rights of the plaintiff to go on until he pays and swears he has paid the tax, we think the restraint nothing but the legitimate and proper exercise of the rights of the State. It impairs no contracts, it divests no rights; it simply says, "do your duty before you use the State's process to compel others to do their duty to you."

Without doubt, a judgment is taxable property. Without doubt, under our laws, in force for many years, this debt owes to the State its burden, and it seems to us *clear* that it is in the power of the State to deny the use of its process to enforce it, until the burden is discharged.

Judgment reversed.

LOCHRANE, Chief Justice, concurred and WARNER, Judge, dissented, but neither furnished any opinion.

Colquitt vs. Mercer & DeGraffenreid.

A. H. COLQUITT, plaintiff in error vs. **MERCER & DEGRAFFENREID**, defendants in error.

1. The Act of 1869, authorizing attorneys to make oath to setting up issuable defenses to suits founded on contract, does not alter sections 3410 and 3412 of the Code, requiring pleas to the jurisdiction to be pleaded in person, and to be sworn to by the defendant.
2. A plea to the jurisdiction may be filed at any time before the defendant has appeared and pleaded to the merits, and if he has filed a plea to the jurisdiction at the first term, which has been stricken because not sworn to, he may, if he has filed no plea to the merits, still file his plea to the jurisdiction. See **LOCHRANE**, Chief Justice, concurring.

Pleading. Attorneys. Constitutional law. Before Judge **HOPKINS**. DeKalb Superior Court. March Term, 1871.

Mercer & DeGraffenreid sued Colquit in said county, upon an open account. The cause was returnable to March term, 1870. The sheriff returned that he served Colquit by leaving a copy at his "dwelling house." Colquit's attorney pleaded at March Term, 1870, that Colquit did not reside in said county, but in Baker county, Georgia, and swore to the plea. Plaintiff's counsel moved to strike the plea, because it was not sworn to by the defendant. This was overruled. On the trial the jury found that Colquit did not reside in DeKalb county. Plaintiffs moved for a new trial, upon the ground that said ruling was wrong. The Court granted a new trial, and upon a renewal of said motion, struck the plea. This is assigned as error.

C. F. AKERS, for plaintiff in error. Attorney may swear to "issuable defense;" Acts of 1869, page 131. Plea to jurisdiction is issuable defense: 3 Bl. Com., 315; 1 Ch. on Pl., 651.

L. J. WINN, for defendants. Plea to jurisdiction must be sworn to by defendant: R. Code, secs. 3410, 3412. Appearance waives jurisdiction: 1 Ch. on P., 444. Issuable plea means plea to merits: 1 Ch. Pl. 511; 41 Ga. R. 410.

McCAY, Judge.

Was the plea to the jurisdiction properly filed? The Code section 3410, provides that such a plea must be pleaded in person, and, by section 3412, it must be sworn to. The implication is almost irresistible that the oath must be by the party, and such has, without doubt, always been the practice in this State. It is, however, insisted that the Act of 1869 changes this practice, and that such a plea may now be sworn to by an attorney if the defendant is not a resident of the county where the suit is pending. That Act provides that in suits upon contracts, if the defendant is resident out of the county, "issuable" pleas may be sworn to by the attorney. Why not *all* pleas? And why only in suits upon *contracts*? Clearly, as it seems to us, with some special intent. The Constitution of 1868 provides that in suits upon contracts the Court shall give judgment without the intervention of a jury, where an issuable defense is not filed under oath: Con. Art. 5, par. 3. As this has been understood to apply to pending suits as well as to suits afterwards brought, it happened that defendants, who, since the bringing of the suit, had moved to other counties, were put to great inconvenience, and their pleas heretofore filed were dismissed for want of the affidavit. To remedy this evil in the main, the Act of 1869 was passed. Its whole language shows that it has reference to the cases arising under the provision of the Constitution to which we have referred.

What, then, is the meaning of this clause of the Constitution: "The Court shall render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defense is not filed under oath?" It is a settled rule, in the construction of statutes, that technical words are to be understood in their technical sense. The phrase, "issuable defense," is a technical phrase. In the books upon pleading, it means a plea to the merits, properly setting forth a legal defense. It is specially contradistinguished from a

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plea in abatement, or any plea going only to delay the case. And by using the words, "*contract*" and "*issuable defense*," the implication clearly is defense to the *contract* or to the *merits*.

We must construe the Constitution in the light of the history of the subject. Previously, pleas in abatement had all to be sworn to: Code, 3404. But pleas to the merits needed not to be sworn to. A simple statement, in proper form, denying the right of the plaintiff to recover, for any reason, if it was not demurrable, required a jury to pass upon the issue thus presented. The result was delay. Even the general issue, which was considered pleaded, if the defendant answered at the first term, required a jury. Nay even in a suit on an account where the defendant was personally served, a judgment by default required a jury to pass upon the evidence the plaintiff presented: Code, 3405, 3406. The Constitution intended simply to change this, and to provide that, even in pleas to the merits, the verification should be required, or a jury trial should not be had.

Pleas in abatement, dilatory pleas, were not within the mischief, nor are they covered by the words "*issuable defense*." The law as to them stands as it did before.

It is true a plea in abatement is a plea, and if it be properly pleaded issues may be found on it. In the ordinary meaning of the word "*plea*," and of the word "*issuable*," such pleas may be called issuable pleas, but when these two words are used together, "*issuable plea*," or "*issuable defense*," they have a technical meaning to-wit: pleas to the merits. We conclude, therefore, that neither the Constitution of 1868, nor the Act of 1869 had any reference to pleas in abatement, which are not "*defenses*" to the contract. We feel the more disposed to affirm the judgment of the Court on this ground because there is nothing in the Act of 1869 relieving the defendant from pleading, *in person*, a plea to the jurisdiction which is the express requirement of section 3410 of the Code. The question of the residence of the party, and most pleas to

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the jurisdiction in this State turn on residence, is so much a matter of intention that there is great propriety in requiring the defendant to verify it by his own oath.

2. But we are of opinion that the defendant may yet, so far as appears from this record, put in his plea. It is true that the Code, section 3412, requires such a plea to be put in at the first term; but this is to be taken in connection with 3408 and 3409, and must mean if he pleads also to the merits, since it is expressly provided that he does not waive his plea unless he pleads to the merits without pleading also to the jurisdiction. The residence of the defendant in the county where the suit is brought is a *sine qua non* under the Constitution. It cannot even be waived so as to affect the rights of third persons: Code, 3408. And the defendant may deny it, even after judgment, if he had not waived it: Code, 3536. What the party may deny after judgment he surely may deny before judgment.

This plea by his attorney having been stricken, he has as yet pleaded nothing, and has not, therefore, waived the jurisdiction, and may now plead it in person and under his own oath.

Judgment affirmed.

LOCHRANE, Chief Justice, concurring.

I have some doubt in this case as to the ruling of the Court construing the Act of 1869. That Act declares "that from and after the passage of this Act, in all civil cases founded on contract, where there is an issuable defense, and where the defendant does not reside in the county in which suit is pending, it shall and may be lawful for the agent or attorney at law of such defendant to make oath to the plea, and the same shall be as good and sufficient as if made by the defendant himself."

The Constitution, section 5174, declares "the Court shall render judgment without the verdict of a jury in all civil

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cases founded on contract when an issuable defense is not filed on oath."

The question is, whether the limitation in the Constitution applies to the Judge rendering judgment without a jury, or applies to the character of the issuable defense by limiting such defense to be a defense to the merits.

It strikes me that the limitation is on the Court. The language is, in any case, founded on contract, when no issuable defense has been filed on oath the Court will render judgment without a jury, just as if it say, in cases where an issuable defense is filed the Court will not render judgment without the intervention of a jury.

The only question, therefore, is: Is a plea to the jurisdiction an issuable defense? No doubt about its being so. If it is, the Court cannot give judgment, and if it is an attorney may swear to it by the Act of 1869; for the Act is, where there is an issuable defense the attorney may swear to it.

But the construction placed upon the Constitution is, that it means an issuable defense to the contract; in other words, a plea to the merits, and an attorney, by the Act of 1869, may swear only to this "issuable defense."

It is not without doubt in my mind but that the *issuable defense*, contemplated by the Constitution, is any *issuable defense* which, when filed and verified, prevents the Courts rendering judgment, and the Act of 1869 authorizes the verification, by an attorney, of "an issuable defense." That a plea to the jurisdiction being a plea required by law to be pleaded in person, may, by this fact, not come within the spirit of the Constitution, strikes my mind with reasoning force, and, for this reason, while a plea to the jurisdiction is an issuable defense, and while attorneys may verify issuable defenses, and they have the same force as if done by the defendant in person by the Act of 1869; still, as this Court has decided it not to apply to cases of pleas to the jurisdiction, I concur in the judgment.

Venable vs. Craig.

DELILAH M. VENABLE, plaintiff in error, vs. JAMES W. CRAIG, defendant in error.

1. When a libel for divorce was filed in 1868, in Jackson county, and with it a schedule of the property owned by the husband at the time of the separation, in which was included "a city lot, in the city of Atlanta," and the husband, in 1868, before the final verdict sold the lot to a purchaser, who had no actual notice of the pendency of the libel, and the jury, on the final trial, granted to the wife a divorce, *a vinculo matrimonii*, and decreed to her, as alimony, the real estate mentioned in the schedule, for life, with remainder to the children:

Held, That, under section 1720 of the Code, the sale by the husband, after the filing of the libel, the said sale not being in payment of pre-existing debts, did not vest the title in the purchaser so as to prevent the vesting thereof in the wife, according to the verdict of the jury, on the final trial of the divorce case. The purchaser bought subject to the said verdict, and his want of actual notice does not protect him.

2. Negotiations and agreements between husband and wife, pending a libel for divorce, as to the alimony of the wife, and agreements between them in relation thereto, are, by presumption of law, merged in the final verdict of the jury in the divorce suit, and a purchaser from the husband, pending a suit of property, mentioned in the schedule, is bound by the verdict, as is the husband, as to the legal rights of the wife to the property, unless he can show fraud in the verdict affecting his rights, and to do this, he must attack the judgment before the Court which rendered it, as he is a privy thereto.

3. When, in a schedule, filed with a libel for divorce, there is contained an item of "a city lot in Atlanta, worth \$5,000 00:"

Held, That, as the schedule purports to be all the property of the husband, the description is sufficient to put everybody upon notice, if there be, in fact, but one such lot. LOCHRANE, Chief Justice, dissenting.

Judgments binding on parties and privies. *Lis pendens*. Divorce. Before Judge HOPKINS. Fulton Superior Court. April Term, 1871.

Craig's bill against Mrs. Venable made this case: On the 6th of August, 1866, he having lately moved into this State and settled in Fulton county, bought, at public auction sale, lot number thirty-six, on the west side of Marietta street, in Atlanta, Georgia, containing a half acre, at \$2,800 00, cash,

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and paid the auctioneer for it, and took a deed therefor from John Venable. The property had been advertised for sale, in a public gazette in Atlanta. He took possession, and built upon it a dwelling and store, etc., at a cost of \$5,300 00. About twelve months afterward, he heard that Venable's wife claimed that said property had been set apart to her as permanent alimony, when she was divorced from Venable. Before this, he did not know that Venable had a wife, nor anything of their separation, etc. He then got from Jackson county, Georgia, a copy of a record, showing the following facts: In February, 1864, Mrs. Venable sued John Venable for a divorce, because of adultery, and he was served. She claimed no alimony, nor did she file any schedule of property owned by Venable at the time of separation. Venable pleaded not guilty, and condonation, and claimed a divorce from her for cruel treatment. In August, 1866, a jury gave her a first verdict of divorce *a vinculo matrimonii*. During August Term, 1866, of said Court, or afterwards, she made out and swore to a schedule of property, purporting to give a list of the property owned by Venable in 1863, when they separated. There was therein realty, estimated at \$5,800 00, and personalty, estimated at \$2,775 00. Of this realty was "one lot in the city of Atlanta, worth \$5,000 00." This is the lot which Craig bought as aforesaid. It does not appear when said schedule was filed in the Clerk's office. In August, 1867, the jury rendered a verdict finally divorcing her from said Venable, giving to her during her life, and to the children after her death, all the property mentioned in the schedule, and recommending that Venable be allowed to marry again. The Court entered judgment accordingly, and ordered a writ of possession to issue according to law. This judgment excepted any part of the land which might be in possession of any *bona fide* purchaser, in payment of a debt due before the separation. The writ of possession is now held by the sheriff, and, under it, he is about to turn Craig out of possession of said land. Venable told Craig that he used

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said \$2,800 00 in paying his debts, existing at the time of the separation.

Besides, on the 14th of October, 1863, Mrs. Venable had presented to Venable a deed of separation, in which he gave her various specified property, in lieu of any alimony, to which she acceded, in writing. Afterwards, she changed her mind, and she and he entered into a written contract, by which he gave to a trustee, for her, a negro man and \$3,000 00, in consideration of which she released all claims upon him *in futuro*. She had not then sued him. This paper was sealed and recorded in said county of Jackson, on the 18th of August, 1864. The object of the divorce suit at first, was simply to obtain a divorce. The schedule was an after-thought. Venable had moved off to a considerable distance, and because of said provision, already made, supposed there would be no claim of alimony in said case. Or, she and her husband colluded to let him have a divorce also, and, therefore, he made no resistance as to the matter of alimony. This collusion was a fraud upon Craig, because he was a *bona fide* purchaser, for value, without notice of any of the facts. Because of the time and occasion of filing said schedule, and its vagueness, and because of said fraud, he prayed for an injunction against said writ of possession, etc. He prayed that she and Venable answer, etc. Venable was not served. She answered that she did not make the contract for a provision in lieu of alimony, and that Adams, the trustee, never signed it; that she did file a schedule of property when the suit was begun; that the paper alluded to by Craig was but an established copy of the original, which had been lost, and, not seeing said advertisement, or knowing of the sale, denied all fraud or collusion. She said her suit was notice to the world, and, therefore, the property was hers, by law, and worth \$700 00 per annum for rent, and that Craig must look to Venable upon his warranty. *

Upon the trial, (which was before the Judge only, by consent,) Craig testified to the *bona fides* of his purchase, his

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want of notice, his improvements, etc., as he had averred, and that he never heard of the agreement as to alimony till after the litigation began. His counsel then read in evidence said agreement. It purported to be a deed from Venable to one Adams, because of permanent separation from his wife, conveying to him, as trustee, a negro man and \$3,000 00 in cash, for her and the childrens' support during her life, and at her death to the children, and she, in consideration of the premises, released him from all future claim for support for all time to come. It contained a covenant, by Adams, to hold the said property as such trustee. It was not signed by Adams, was signed and sealed by her and Venable, and was witnessed by one Thompson and a Justice of the Peace named Randolph. It was dated the 4th of November, 1863, and was recorded in Jackson county on the 4th of August, 1864. Here Craig rested his cause.

Mrs. Venable testified that Thompson and Randolph brought said paper to her to sign several times before she signed it; that she did not sign it till February, 1864. Thompson was her son-in-law. He came to Adams' where she was staying, told her it was a paper "fixed up for Court," and she must sign it; she said he was deceiving her, but he said he was not, and after about a half hour's hesitation she signed it without knowing what was in it, not having read it nor heard it read, nor heard its contents mentioned. She supposed it might be some paper drawn by her attorney, Silman. In October, before signing the paper, a negro man was sent to her to work, he was sick, stayed but two days, and she sent him back. No money was paid under said contract. They were married in 1841, and have five children, aged seven, ten, fifteen, twenty-four and twenty-seven years, respectively. She denied any collusion with Venable, or consent that he might be relieved from disability to marry. She said he had proposed to give her property in lieu of alimony, but she had refused. She denied seeing said advertisement or knowing anything of the sale till after her final divorce.

Adams testified that he is Venable's half-brother ; that he came in just after Mrs. Venable had signed said paper, and was requested to sign it, but refused, saying he would have nothing to do with the matter. He thinks it was stated that it was the same paper which her attorney had brought to her to sign, that paper he had refused to sign because he thought the provision for her was insufficient. He said Venable paid him no money nor property, that the negro man was sent to his house in October before, in his absence, and upon his return he took him back to Venable.

Thompson testified that in February, 1864, Venable persuaded him to take said paper to Mrs. Venable to sign ; that he did not read it, nor does he believe Mrs. Venable know its contents ; but while she obstinately refused at first to sign it, said she ought to be at home with her husband, and as he, Thompson, believed, signed it, thinking it might result in her returning home. Adams refused to sign it for "various reasons."

Mr. Marler testified that Venable employed him to defend said suit, in 1865. He advised him to make the best compromise he could, as to alimony, and not to defend the suit. His property in Jefferson is claimed by Thompson. He has heard Venable speak of his Atlanta property. When the case came up for trial the schedule was lost, and Silman, her attorney, presented the one mentioned in the bill, saying it was a copy of the lost one, except that the Confederate valuation had been reduced to United States currency, and that it was sworn to because it was possibly not an exact copy of the lost one. Marler, believing it was a correct copy, except as aforesaid, consented that it might be established in lieu of the original, and that was done.

Mr. Silman testified that he filed the lebel for divorce, with a sworn schedule attached to it, in which schedule was a house and lot in Atlanta. The papers were lost and he established copies ; the copy schedule omitted the slaves and Confederate money mentioned in the first schedule, and

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changed the value of the other items by putting them in United States currency. This was sworn to by Mrs. Venable, and was established, by consent of Venable's attorney, as a copy of the original. Before filing the libel, he presented to Venable a list of items of property which Mrs. Venable desired to have set apart for her, and he agreed to all but one item ; he objected to giving her a negro woman and family, saying they would be an expense to her. He indorsed upon the paper his willingness to comply, but she changed her mind before the matter was consummated. He drew a paper for her to sign, relinquishing claim of alimony in consideration of property to be settled upon her, and took it to her, but she refused to sign it and he had no more to do with the negotiations. He thought Venable's said offer was reasonable, considering his pecuniary condition. The house and lot, and personalty perhaps, in Jefferson, were sold under *fi. fa.* against Venable, and said Thompson bought them. It was never understood that the recorded settlement stopped claim for alimony, or that he would not resist Venable's being relieved from the disability to marry, nor did Mrs. Venable give any such directions. Venable's counsel made no defense, except to ask that he be relieved from disability, and witness appealed to the Judge to relieve him, because he thought it was right. They did not present said deed of settlement, but they did nothing to show that they were favoring Mrs. Venable. He, Silman, never saw the advertisement of the sale of the Atlanta lot.

Mr. Thurmond testified that he was one of Venable's counsel, and that they did not offer said recorded deed, because they were advised Mrs. Venable's signature to it was obtained unfairly, Adams never signed it, and the property and money mentioned in it were not delivered. The libel for divorce, with all the proceedings thereon, were exhibited to the bill and went as evidence to the Court.

He decided in favor of the defendant. Complainant moved for a new trial upon the ground that the finding was contra-

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ry to the evidence, the law and equity ; because the Court erred in holding, first, that said recorded settlement was binding on complainant ; and, second, that its legal sufficiency, validity and adequacy as to amount were not in issue in said divorce suit, and there adjudicated against Venable ; and, third, that the notice to Craig by *lis pendens* was insufficient, because of the vague description of the property ; and fourth, that Mrs. Venable's signing said deed put it in Venable's power to sell the property to Craig, especially when said deed is void for want of a trustee. A new trial was refused and error is assigned on said grounds.

HILLYER & BROTHER, for plaintiff in error. Parties and privies bound by fair judgment: R. Code, secs. 3538, 3535, 3776, 6074, 3121 ; 2 Story's Eq. Ju., secs 894-5-6-7, 884 ; 14 How. R., 70, 384 ; 12 Vt. R., 619 ; 13th, 477 ; 19th, 581 ; 5 How. R., 142 ; 9th, 279 ; 17th, 443 ; Adams Eq., 197 ; 6 Paige's R., 624 ; 16 Ala. R., 280 ; 17th, 672 ; 1 John. Cas., 491. Neglect of counsel does not change it : Hilliard on Neg., 85 ; R. Code sec 3700. Deed between husband and wife, without trustee, void : R. Code, secs. 2688, 1743, 1776 ; 8 John. R. 73 ; 5 Day's R., 47 ; 8 Ga. R., 349 ; 2 Ves. R., 352, 359, 361 ; 5 Bligh (U. S.) 375 ; 2 Story's Eq. Ju., sec. 1428 and note ; 14 S. and M. R., 59 ; 2 Kent's Com., 176. Deed not acted upon no estoppel ; 2 Parsons on C., 808, note x. ; 30 Ga. R., 722 ; 13th, 526.

COLLIER & HOYT ; B. H. THRASHER ; ROBERT BAUGH, for defendant. Husband may bar wife's right to alimony by a settlement : R. Code, secs. 1736-7-9. No necessity for a trustee : R. Code, secs. 1783-4, 1776. Innocent purchaser, without notice, protected : R. Code, secs. 3037, 2590, 2598 ; 16 Ga. R., 190 ; 2 Vesey, Jr., R., 457 ; 10 Peters R., 210 ; 2 Story's Eq. Juris., secs. 1562-3. *Lis pendens* not applicable, because at purchase there was no schedule, and when it was filed it was too vague : 2 Wallace's S. C. R., 250 ; 9 Paige's R., 317 ; 16 Ga. R., 81 ; R. Code, secs. 1720, 1721.

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Alimony may be from *corpus* of estate, or otherwise, as jury may decide: R. Code, sec. 1719. The verdict is void as to this lot for uncertainty: 30 Ga. R., 608.

McCAY, Judge.

1. Section 1720 of the Revised Code is in these words: "After a separation no transfer by the husband of any of the property, except *bona fide* in payment of pre-existing debts, shall pass the title so as to avoid the vesting thereof, according to the final verdict of the jury in the cause." Unless this section is to have some other meaning than appears upon its face, every purchaser of property from the husband, after the separation, takes the title subject to the final verdict of the jury in the divorce cause. It is said that *this* meaning is so unreasonable, so contrary to justice and propriety, that it is the duty of the Court, if possible, to give the section a different construction. It is contended that the exception in the section, "except *bona fide* in payment of pre-existing debts," furnished a fair opening for such a construction. One little word "or," it is insisted, ought to be inserted so as to make the exception read, "except *bona fide*, or in payment of the pre-existing debts." This, it is said, would protect *bona fide* purchasers, without notice of the separation. This class of persons, it is said, are not only entitled to be protected upon principles of justice, but are, by another section of the Code, section 3037, declared entitled to it in very broad language, to-wit: "A *bona fide* purchaser, for value without notice of equity, will not be interfered with by a Court of equity." It is said, too, that the broad language of section 1720, if taken literally, works a great hardship on the husband, as under it, though he has a large estate, he can dispose of none of it, not even to obtain the necessities of life.

To all this it may be replied, that this little word "or" would make the whole section of no effect. If the husband may sell "*bona fide*," that is, *honestly, in good faith*,

then the only restriction upon him would be that he could not sell with intent to defraud the wife, and even of this intent the purchaser must have notice. Is it not perfectly apparent that, if the section read thus, the wife would have no protection at all, and that the whole purpose of the provision would fail? The husband might advertise and sell publicly all he had, or he might quietly dispose of it all. Who could say what was his intent? How could the wife prevent him? By bill of injunction? Could she take the oath required, or would the simple sale, if this were the law, justify the Chancellor in interposing? To make this section protect *bona fide* purchasers without notice of the separation simply, far other language than this word "or" would make of it is necessary. The ordinary language, as used in other parts of the Code where such a purpose is in view, would have been almost certainly used. The old Lien Act of 1806 was defective in this very particular. It seemed to *contemplate* this restriction, since it provides that the schedule shall contain the property owned at the time of *the separation*, and that the jury shall dispose of it by their verdict; yet there was no prohibition, in terms, against the sale by the husband. This left a painful uncertainty in the law as to this matter, and it was, doubtless, the object of this section to clear up this uncertainty. The words of the section are plain; the language leads, irresistibly, to the conclusion we have indicated, and any such construction as is contended for would be to interpolate, and put a meaning on the language of the law directly contrary to the plain and natural one. It is not for the Courts to do this. In doubtful cases, when the language is ambiguous, the argument *ab inconvenienti* may be resorted to, but, when there is no ambiguity, the maxim "*Ita lex scripta est*" is imperative. Nor can we join in the objection which is made to the justice and propriety of this provision. We see no other way to protect the wife. When the difficulties between husband and wife have come to the point of separation there is, generally, great bit-

teness of feeling, and were the property wholly in the power of the husband the wife would fare but poorly. The old notion that the wife is lost in the husband, and that everything is his, has been largely modified in modern times, and society now recognizes that the property is rather the property of both than of the husband alone. There is, therefore, no injustice in a law which declares that, when they can no longer live together, it shall not be in the power of one to dispose of the property of the community. Nor is there any special hardship on purchasers. Nothing is more common than to hold even purchasers to the rule of "*caveat emptor*." Indeed, in almost all cases where a law is founded on public policy, a purchaser buys property subject to it at his peril.

Is not everybody bound to take notice that one is an infant, or that a woman is married? Why should not everybody be bound to take notice that a man has separated from his wife? The least inquiry in the neighborhood where he resides would almost always discover the fact. One is bound to make such inquiries, to know if there be a *lis pendens*, or a judgment, or a marriage settlement, and if the Legislature so provides, we see no objection, in furtherance of the public policy of protecting the wife, to putting the fact of separation on the same basis.

It will be noticed that this section of the Code does not make the sale void; it simply says, "a transfer shall not take place so as to prevent the title from vesting according to the verdict." The husband may sell subject to the verdict, and if he have sold property for purposes consistent with this policy of the law, to *protect* the wife, the jury will see to it, in their verdict, that no wrong is done by their decree.

2. The purchaser, as we have said, buys subject to the verdict. He is a privy to it; he stands in the shoes of the husband, and is bound by the verdict. Without doubt, the husband could not set up this agreement after and against the verdict. Supposing it to have been fairly made, and to

have conformed to law in every particular, why was it not pleaded and set up as a bar to the verdict granting alimony? We have held, over and over again, that a judgment of a Court of competent jurisdiction is binding between the parties and their privies, as to all matters involved in the issue. Was not the right of the wife to alimony one of the chief issues in the divorce trial? If there was fraud and complicity between the husband and wife, by which the rights of this purchaser are affected; if, having fully settled between themselves, in a lawful way, the alimony dispute, they had procured this verdict with a fraudulent purpose, to affect the rights of purchasers, the verdict could, without doubt, be attacked in the proper Court. But it is a fixed rule, that the verdict concludes all parties privy to it, as to all matters involved in it. And this very question, to-wit: what should be the alimony of the wife, and out of what portion of the scheduled property it should be paid, was the very thing in issue, in the property part of the final verdict.

3. If we are right as to the question of the construction of section 1720 of the Code, the husband is under a disability to transfer any of the property after the separation, so as to prevent the vesting of the title according to the verdict. No *lis pendens* is necessary to give notice; the sale is prohibited by law, and everybody is bound to take notice. This disposes of the argument that the schedule does not affirmatively appear, in its present shape, to have been on file at the date of the sale. The proof is that the papers had been lost and a schedule was made out as nearly like the original as possible, and sworn to anew, because the estimated value of the property was changed from Confederate money valuation to a valuation in United States currency. We know of no authority that a *lis pendens* ceases to be notice if the papers be mislaid. Here was, in any event, notice that a suit for divorce was pending, and any one who knew this knew, by the law of the land, that all the property owned at the separation was subject to the final verdict. It was not necessary

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to see the papers to know this ; it followed by operation of law. The schedule could at any time be amended. Indeed, it need not necessarily be filed with the writ, as, by section 1719, it may be filed afterwards, under the order of the Court. The only actual necessity for looking into the schedule is to determine whether the description is sufficiently plain and definite to enable possession to be given. The schedule purports to be a statement of all the property owned by the husband at the time of the separation. It sets forth a city lot in the city of Atlanta worth \$5,000 00. As the husband had but one such lot, it was easy to show that the lot in question is that lot. That is certain which can be made certain. The officer must always, in executing a process, inquire for the lot by its description. If it is by metes and bounds, he must hunt them up ; if it is by a statement of the names of the adjoining lot owners, inquiry must be made and acted on. And so here. The record may be looked to for the title of the husband, and inquiry made, as in other cases, to get at the truth.

Judgment reversed.

WARNER, Judge, concurred, but furnished no opinion.

LOCHRANE, Chief Justice, furnished no opinion. From the bench he dissented as follows :

While A bought property at public auction, sold as the property of B, and paid therefor a full consideration, and at the time of the sale B and his wife were separated, under section 1720 of the Code, I do not think the title of the husband was so limited as to prevent the sale of the property *bona fide* by the mere fact of the separation, or that it was the duty of A to inquire into the domestic relations of B, and that the wife's rights or equities are superior to those of a *bona fide* purchaser for consideration without notice.

When a divorce suit was filed in 1864, and the schedule sworn to containing the property in controversy was filed

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after the purchase by A, I hold that such suit was not notice to A of the wife's claim to the property, and the fact that previous papers in the case had been lost could not operate to effect A with notice of an equity in the wife until after the schedule containing his property was filed.

When the schedule contained the description of the property as one lot in the city of Atlanta, I think the description too indefinite and uncertain as to the property claimed to operate as notice by *lis pendens*, so as to defeat the title of a *bona fide* purchase, etc.

When, upon the record, it appeared that B and his wife had a settlement for alimony, in which adequate means were admitted to be made by the wife who signed the same, I think such record may be asserted by A in defense of his rights.

When the verdict of the jury is in favor of the wife for the property contained in the schedule, being one lot in the city of Atlanta, I think such judgment does not divest the title of a *bona fide* purchaser under the facts; and, upon the record, I think the judgment of the Court below ought to be affirmed.

WILLIAM WORTHY, plaintiff in error vs. THE STATE OF
GEORGIA, defendant in error.

1. Upon the trial of an indictment for adultery, it is error in the Court to refuse a continuance for the absence of two witnesses, who had been subpoenaed and were within the jurisdiction of the Court, by whom the prisoner expected to prove his innocence: and the fact of one being the woman accused does not change the rule:
2. The fact that the Judge announces his readiness for parties to send for their witnesses does not necessarily deprive a prisoner, who has not availed himself of it, of his legal rights to a continuance when his case is called in its order for trial.
3. Where the evidence in the case is all presumptive and the jury have found a verdict of guilty, this Court will grant a new trial upon the

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ground of the absence of witnesses with greater liberality than in a case where the guilt of the accused is manifest by the proof.

Criminal law. Continuance. Before Judge PARBOTT. Whitfield Superior Court. April Term, 1871.

Worthy was indicted for adultery with Jane Lemons. When the case was called for trial he moved to continue for the absence of Jane Lemons, who would swear he had not had carnal knowledge of her and the absence of another, who was familiar with his premises and conduct, and would detail facts rebutting the idea of his guilt. The showing was in every way legal, but "Court had progressed nearly two weeks, and the Court had, in every case, ordered the sheriff to arrest and bring witnesses, or imprison them in any criminal case, when application was made by either the State or defendant, and it did not appear in this case that any reasonable effort had been made, or proper diligence had been used, to secure the attendance of the witnesses," and, therefore, the continuance was refused.

The only evidence of guilt was that Worthy and his wife separated; that for a time his son-in-law and his wife lived with Worthy, and she did his cooking, and when they left he hired Miss Jane Lemons, who had been raised on his farm, to live with him and cook for him. No witness ever saw any familiarity between them, but she slept in the same room with him, in which room were the only two beds upon the premises. The jury found Worthy guilty. He moved for a new trial upon the grounds that the Court erred in refusing the continuance, and because the verdict was contrary to the evidence, etc. The refusal of a new trial is assigned as error.

JOHNSON & McCAMY; JESSE GLENN, for plaintiff in error. Defendant not bound to have witnesses bound over to attend Court: 5 Ga. R., 48; 10th, 85; 14th, 22; 30th, 10.

C. E. BROYLES, Solicitor General; D. A. WALKER, for the State.

LOCHRANE, Chief Justice.

The plaintiff in error was indicted for the offense of adultery, and upon the trial moved for a continuance, upon the ground that he had two witnesses subpoenaed, by whom he expected to prove his innocence, one of whom was the female accused of the offense, which the Court overruled upon the ground of his announcement, that, upon notice, he would send for witnesses, etc. The case proceeded, and the evidence against the accused was entirely presumptive. No witnesses showed or testified to any fact of guilt in the premises. The jury convicted the accused and he moved for a new trial, which was overruled, and this judgment of the Court is assigned as error.

1 and 2. We are satisfied the Court erred in the judgment and ruling in this case. The prisoner was entitled to a continuance. His showing came within the rule of law, and the fact of one of his witnesses being the party accused, did not defeat the right. It is true, she was the *woman*, but she was a competent witness, and certainly, if she swore, none could detail the facts of innocence with more clearness than herself.

2. When the proof offered by the State was circumstantial, and depended more upon the opinion of the jury from the opportunity afforded to commit the act, than any proof of its commission; and the evidence taken in its very broadest sense, was very weak and unsatisfactory, it was error in the Court to overrule the motion for continuance, and, especially after the conviction, upon the proof offered, to refuse a new trial.

Judgment reversed.

Wright *vs.* McDonald.

FRANCES WRIGHT, plaintiff in error, *vs.* J. W. D. McDONALD, defendant in error.

Where a note given for the purchase-money of land was traded after due, and suit instituted by the transferee upon such note went into judgment in 1867, and in 1869, the vendor of the land died, and his widow set up her claim to dower in the land, which was allowed her, upon the ground that the land came by inheritance through her, and she had not relinquished her right thereto, in terms of the law, and the vendor, the defendant to the suit upon the note, filed his bill in equity, praying an injunction and setting forth the facts, which was granted by the Court:

Held, The transferee of the note, after due, took it with the existing equities between the original parties, and the claim for dower, under the facts, was not such an equity as the defendant was bound to plead to the suit in 1867, as the right did not ripen until after the death of the vendor, in 1869, and that this Court will not interfere with the judgment of the Court below in granting an injunction restraining the collection of the judgment, at law, until the hearing under all the facts in this case.

Promissory notes. Dower. Before Judge PARBOTT.
Murray county. Chambers. August, 1871.

The facts are in the opinion.

A. FARNSWORTH; W. W. GIBBONS; JOHNSON & McCAMY, for plaintiff in error.

D. A. WALKER; SHUMATE, for defendant. As to defense since judgment, cited: 16 Ga. R., 403; 40th, 495, 501; 2 Wh. & T. L. Cases in Eq., 97 *et seq.* Dower assigned is breach of warranty: 4 Ga. R., 493. Plaintiff having taken note after due, is bound by all equities between original parties: R. Code, sec. 2744; 2 Kelly's Ga. R., 135; Smith's M. L., 276; 1 Parson on Con., 214; Story on Prom. Notes, sec. 190.

LOCHRANE, Chief Justice.

This case presents, substantially, the following facts: McDonald purchased, in 1861, from a man named Davis, some

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land, for which he gave his notes for \$5,500 00, taking bond for titles, and paying up the notes, except the last, for principal, \$1,700 00, upon which he paid, in January, 1863, the sum of \$800 00. This note, a balance due thereon, was traded to the plaintiff in error, in 1863, after it was due. Upon this note, to the October Term, 1867, suit was brought and judgment recovered, and upon which a payment was made by McDonald, after the judgment. The vendor of the land died, and his widow, Mrs. Davis, instituted proceedings to have her dower assigned in the lands, the consideration of the note. In this proceeding she was successful, and McDonald, the vendee, filed his bill in equity to restrain the levy and collection of the judgment, and, upon hearing the bill upon demurrer thereto, the Judge granted the injunction prayed for. This is the sole question in the case. '

It is conceded that, as Mrs. Wright traded for the note after its maturity, she took it with all the existing equities between the contracting parties, and if McDonald knew, when he was sued, in 1867, upon the note, of this equity or right of the widow of Davis to dower, and failed to plead it, is he estopped. If Davis had died before the suit or judgment, we think it would have been incumbent on him to have moved in his defense, to protect himself against the rendition of the judgment. But when this judgment at law was obtained, Davis was in life, and the defendant could not have pleaded the assignment of dower against recovery upon the note for the purchase-money, for he was in possession, and undisturbed. And we hold, that before the collection of the money upon that judgment, Davis having died, and his widow having had dower assigned, he was still entitled to invoke the interposition of a Court of equity. And we see no legal reason to reverse the judgment of the Chancellor, under the facts in this case.

Judgment affirmed.

Pool vs. Perdue.

JAMES S. POOL, plaintiff in error, vs. S. S. PERDUE, trustee,
defendant in error.

1. A commissioned Notary Public, as *ex officio* Justice of the Peace under the Constitution of 1868, may issue an attachment as any Justice of the Peace may under the provisions of the Code.
2. One holding a commission from the Governor as Notary Public and *ex officio* Justice of the Peace, and acting as such, is a *de facto* officer, and his official acts cannot be attacked collaterally by the parties to a suit, on the ground that his appointment was not authorized by law.
3. Objections to the form of the affidavit in an attachment are waived by the appearance of the defendant, and pleading to the merits.
4. A written notice to the defendant, that an attachment is pending against him, stating the Court to which it is returnable, and the time, and stating on what property it has been levied, is a sufficient compliance with section 3283 of the Code to authorize proceedings as in an ordinary suit, especially if the defendant appear and plead to the merits.
5. When objections were filed to certain interrogatories, as leading, and the Judge certifies that, upon his announcement that if the objections were sustained he would continue the case, the party making the objections ceased to urge them, this Court will not, for that reason, grant a new trial.
6. In this State, one partner may sue another at law, and if he is able to show the affairs of the concern so settled, as the jury can ascertain what is justly due him, he may recover.
7. Upon the whole case, we think there was no error in the judgment refusing a new trial.

Notary Public. *De facto* officers. Attachments. Waiver. Interrogatories. Partnership. New Trial. Before Judge GIBSON. Richmond Superior Court. June Term, 1870.

On the 28th of October, 1869, Perdue made affidavit before one Reynolds, of Augusta, as a Notary Public and *ex officio* Justice of the Peace, that Pool resided out of this State, and was indebted to him, as trustee of his wife, \$2,000 00, *to the best of his knowledge and belief*. He gave the usual attachment bond with one security. Said Notary approved it, and issued an attachment against Pool. On the 1st of November, 1869, this attachment was levied upon Pool's

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property. On that day Pool filed a bill averring said facts, that said attachment was void because the affidavit was not positive as to the indebtedness, that he owed Perdue nothing, that said security was worth nothing over and above the exemptions allowed by law, and prayed for an injunction against said proceeding, because the property would suffer by detention by the sheriff. The Chancellor ordered injunction to issue, unless, upon notice, said bond be made to conform to law, and good security be given.

On the 12th November, 1869, after notice of said injunction, served on the 3d, said bond was amended by striking out the italicized words, having the first security to justify, and giving two additional securities.

On the 31st of December, 1869, Perdue filed his declaration averring that he succeeded a former trustee of his wife, that a partnership in farming existed between Pool and such former trustee as such, that all the firm debts were paid, but that Pool still owed the trust estate on account of said partnership, \$2,840 65. The bill of particulars charged Pool with the prices of the produce sold by him, etc., credited him by service, etc., and charged him said \$2,840 65, as one-half of the net balance due on the settlement of the business.

On the 26th of February, 1870, Perdue's counsel served Pool with notice that said notary had issued said attachment, returnable to the January Term, 1870, of Richmond Superior Court, stated upon what property it had been levied, and that it was still pending.

In March, 1870, Pool pleaded the general issue, that he never was a partner with Mrs. Perdue's trustee, but that he was partner in farming with the former trustee and with Perdue in their individual capacities, and that Perdue owed him in the sum of \$880 54 by reason of his failure to perform his duty as a partner in said farming operations. To this plea was attached a bill of particulars from which he deduced that balance.

In June, 1870, the cause came on for trial. Pool's coun-

sel moved to dismiss said attachment upon the following grounds: 1st. A Notary Public and *ex officio* Justice of the Peace has no authority to issue an attachment. 2d. Reynolds was not a legal Notary Public, because Augusta contains but four militia districts, and in each there was a Notary Public and *ex officio* Justice of the Peace, in commission, when Reynolds was commissioned, and by the Constitution there can be but one in a district. 3d. Because, after the injunction was ordered, no new affidavit or new bond and levy were made, but the old papers stood, only altered as aforesaid. 4th. Because the declaration shows that the claim is for an unliquidated balance claimed by plaintiff from defendant as his partner, etc. The Court overruled the motion and the trial proceeded.

Plaintiff had sued out interrogatories for Blodgett, the former trustee. When Pool's counsel went to cross them they wrote upon them that they reserved "any and all objections to the form of these interrogatories and to the many leading questions therein contained." These interrogatories had been answered and in office some time before the trial. When plaintiff's counsel offered them in evidence, Pool's counsel objected to them because they were leading, and because some of the cross-interrogatories were not answered. The Court overruled the objection and the evidence was read to the jury.

There was evidence *pro* and *con* upon the issues made by said pleas, and the jury found for the plaintiff for \$2,840 68, with interest and costs. A new trial was moved for upon the ground that the Court erred in refusing to dismiss said attachment; in not rejecting said interrogatories; in holding that one partner might recover against another, at law, because the verdict; for more than the attachment claimed, was contrary to the evidence, etc., etc. The Court refused a new trial, and error is assigned on each of said grounds.

Pool vs. Perdue.

A. D. PIQUET; A. R. WRIGHT, for plaintiff in error. As to appointment of Notaries Public: Par. 4, sec. 6, Art. V., Const. of 1868. The affidavit was defective: R. Code secs. 3200, 3233. The interrogatories should have been rejected: R. Code, sec. 3835, repealing sec. 4, of Act of 1854.

H. CLAY FOSTER; J. C. C. BLACK, for defendant. The Notary was *ex officio* a Justice of the Peace, by said paragraph of the Constitution, and therefore could issue attachment: R. Code, sec. 3199. Reynolds was, at least a *de facto* Justice: 20 Ga. R., 746, R. Code, sec. 120. The objections to the attachment were too late: R. Code, sec. 3233. So as to those to the interrogatories: 29 Ga. R., 443, 31st 625, as modified by sec. 3835 of the Code; 8 Ga. R., 425. As to new trial: 1 Ga. R., 580; 10th, 429; 14th, 154; 39th, 119; 2d, 100; R. Code, secs. 3529, 3532; 31 Ga. R., 140.

McCAY, Judge.

1. As we understand the Constitution of 1868, a commissioned Notary Public is a Justice of the Peace for the district for which he is appointed, with all the powers and functions of such an officer. Provision for their appointment is made in that section of Article 5 of the Constitution which is directed to "Justices of the Peace." And by section first of that article, they are classed among the constitutional judicial officers. It is well known as part of the history of the times, that such was the intent of the framers of the Constitution, and that the language was designed simply to make one of the Justices in each district chosen by the people and the other appointed by the Governor.

2. There is no dispute but that the acts of an officer *de facto* cannot be attacked collaterally. The public interest in favor of this rule is too obvious to need elaboration. See *Hinton vs. Lindsay*, 20 Georgia Reports, 746; Code, section 120. The only question about which doubts have arisen is, when is one a *de facto* officer? Clearly, however, one hold-

ing the commission of the Governor, to an office which the Governor is, by the Constitution, authorized to fill, must be, at least, a *de facto* officer: Code, section 120. We are of opinion that there can be but one legal commissioned Notary in a district at one time, but the proper mode to settle this is by a proceeding for the purpose, and not, as is attempted here, by collaterally attacking his acts.

3. Section 3236 of the Code provides that the affidavit may be traversed at the *first term*, and it has been the uniform practice to consider this right as waived if not done then. Section 15, New Rules of Court. Here it appears that the defendant had appeared and pleaded to the merits before his objections to the attachment were made. We think he was too late to do this. After a plea to the merits a defendant can make no objection to the mode by which he has been brought into Court. Code, section 3259.

4. The notice given in this case covers, almost, in terms, the requirements of the statute: Code, section 3232. Notice is required of the "pendency of the attachment, and of the proceedings therein." The only proceeding then had here was the levy. The notice given specifies the parties, the Court, the term, and the property levied on. We think that a sufficient notice. With that, the defendant was informed of everything but that which a copy of the declaration would give him. That is not required, and he can see that, upon inquiry.

5. The objection to the answers of the witness—that is, to his failure to answer the cross-questions—was an objection to the execution, and came too late: Code, 3835; 8 *Georgia Reports*, 425. The other objection made was, that the questions were leading, and this objection was made and filed with the crosses, at the time the defendant crossed the interrogatories. We are inclined to think the Act of 1854 is inconsistent with section 3835 of the Code, but we do not so decide. The bill of exceptions does not present this point clearly for our decision. The Judge certifies that he under-

stood this objection to be waived on his announcement that if he sustained it he would continue the case. And this Court would be very reluctant to grant a new trial, on such a statement. It does not affirmatively appear that the Judge overruled the objections, and we do not think such a loose statement would justify us to call what transpired a *judgment* of the Court, subject to reversion here. At best, the point made is upon a matter which is by no means material, and it would be rather trifling with justice, and with the public interests, to have this whole case gone over, because a leading question was put in the interrogatories.

6. Our law is very broad as to the right to sue at law: Code, section 3027. If the proper allegations are made, and the proof shows that a money verdict can settle the rights in dispute, the plaintiff may go on at law, even against his partner. Nor are we prepared, at present, to limit the jurisdiction at law to a money verdict for the plaintiff, or a verdict for the defendant. The statute expressly allows the verdict to be moulded and framed so as to give equitable relief in the case, as verdicts and decrees are rendered and framed in equity proceedings. How far this may fairly go, we are not prepared to say, until a case arises requiring a determination of it.

7. We see nothing in the verdict to call for our interference with the judgment of the Court. The evidence is conflicting, and it was clearly the province of the jury to settle the conflict.

Judgment affirmed.

Jones and O'Dowd vs. Russell.

W. C. JONES and M. O'DOWD, plaintiffs in error, vs. H. F. RUSSELL, Mayor, etc., for use, etc., defendant in error.

H. F. RUSSELL, Mayor, etc., plaintiff in error, vs. CLARENCE WALKER *et al.*, defendants in error.

Clarence V. Walker was elected an auctioneer of the city of Augusta, and executed his bond as required by law. During his term as such auctioneer he sold certain properties entrusted to him, and failed to pay over to the parties the proceeds. Walker and his securities upon the bond were sued, and the main question raised by the pleadings, and which is embraced in the two writs of error filed in this case is, that Walker pleaded his discharge in bankruptcy, which the Court allowed, and the sureties relied on the discharge of their principal for their discharge, which the Court disallowed.

We hold that the Court erred in holding that Walker was discharged under the facts in this case. The 38d section of the Bankrupt Act, March 2, 1869, provides "that no debt created by the fraud and embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act." Waiving the question as to whether or not Walker was a public officer under the Act of December 24th, 1827, we are clear in the opinion that the debt sued on was created while acting in a fiduciary character, and therefore did not entitle the discharge of the principal in this case. *Held again*, That the sureties on the bond were liable under the facts.

Bankruptcy. Sureties. Before Judge GIBSON. Richmond Superior Court. June Term, 1870.

In 1867, Walker became an auctioneer in Augusta, Georgia. As such, he gave bond conditioned as follows:

"Now, if the said C. V. Walker, his executors, administrators and assigns, shall faithfully pay all duties and taxes, which are now or may hereafter be imposed upon sales at vendue, by any law of said State or ordinance of said city, and shall pay over all moneys, and transfer and deliver all notes, bonds, obligations and other valuable thing or things, received by him for merchandise, or other property sold at vendue or at private sale, to the owner or owners of the same, or to his, her or their legal representatives, upon demand, made for the proceeds of such sale, and shall also obey

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every lawful order which the said C. V. Walker may receive from the owner or owners of any merchandise or other property placed in his hands, respecting the sale or disposition of the same, and shall do and perform all other act or acts required of him, as vendue master, during his continuance in office, by the laws of said State and the ordinances of said city, then the above obligation to be void, else to remain in full force and virtue."

As such auctioneer, he was entrusted with goods for sale, and sold them. Afterwards, he was discharged as a bankrupt, under the Act of Congress of 1867, without having paid the proceeds of said goods to their owner. The owner sued, in the name of the Mayor, for his use, Walker and his sureties for said proceeds. They pleaded Walker's said discharge. The Court held that Walker was discharged from this debt, but that his securities were not. This is assigned as error.

JOSEPH P. CARR and J. C. C. BLACK, for Jones. O'Dowd and Walker were released from this debt: Bankrupt Act of 1867, sec. 34. Walker was not covered by any exception in the bill: section 33. He was no public officer: 35 Ga. R., 285; 4 Wal., S. C. R., 333; R. Code, sec. 1438. He is not a fiduciary: 2 How. R., 202; 7 Metcalf R., 328; 100 Mass. R., 498; 15 Gray, 347; 7 Alabama R., 335. As to trusts: R. Code, secs. 2023, 2307, 2085, 2079. As to fraud or embezzlement: 4 B. R., 15; 2d, 11; 102 Mass. R., 429. As to sureties: 1 Kelly, 36; 6 Ga. R., 303; 7th, 31; 38th, 224; 4 Md. R., 114; 100 Mass. R., 450.

HILLIARD & KING; F. MILLER, *contra*. Auctioneer's failure to pay proceeds of goods sold by him was embezzlement: R. Code, sec. 4356. Auctioneer is officer: Act 24th Dec., 1867; 3 McL., 485. The auctioneer was a fiduciary: 6 Int. Rev. Record, 61; 2 Bank. Reg., 74, 114; Bump's Bankruptcy. 440.

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LOCHRANE, Chief Justice.

The legal question raised by the record in these cases, argued together, is the right of Walker to be discharged from his liability for the amount claimed to be due the plaintiff, from the fact of his having been discharged as a bankrupt. It appears from the record that during his term as auctioneer of the city of Augusta, he had disposed of the goods entrusted to him by the plaintiff, and this suit was instituted to recover the proceeds. The 33d section of the Bankrupt Act, of March 2d, 1869, provides that certain classes of claims, originating in fraud, embezzlement, defalcation, or while acting in a fiduciary character, shall not be discharged by the discharge of the bankrupt; and the first question to be determined, is whether this claim falls within this section of the Bankrupt Act. It is admitted that he was acting as an auctioneer of the city of Augusta, and I am of opinion, personally, that he came within the definition of a public officer, under the Act of 1827. But, as the discussion of this subject is not essential to the decision of the case, we need not enlarge upon it. In the opinion of the Court, this debt sued on was created while the defendant was acting in a fiduciary capacity or character, and, therefore, it was error in the Court below to have sustained the plea of his discharge in bankruptcy, as such discharge did not enure to the defendant as a protection against a debt created while he was acting in a fiduciary capacity.

It being the opinion of the Court that Walker was not discharged, it follows that his sureties was not entitled to be relieved of their liability on his official bond, and we affirm the judgment holding them liable. Judgment reversed in the case of the Mayor, etc., vs. Walker *et al.*, and affirmed in the other case, Jones, etc., vs. Russel, Mayor, etc.

The City Council of Augusta vs. Sweeney.

The CITY COUNCIL OF AUGUSTA, plaintiff in error, vs.
M. E. SWEENEY, defendant in error.

Where a public office is created by the authorities of a municipal corporation :

Held, That an incumbent of the office does not have such an interest in the salary as that the corporation cannot, at its discretion, abolish the office, and by so doing deprive him of his right to tender his services and demand his salary, for the full time for which he was elected.

Constitutional law. Officers. Vested Rights. Before Judge GIBSON. Richmond Superior Court, June Term, 1870.

An ordinance of the city of Augusta required its City Council to elect, biennially, on the second Saturday in January, a hospital physician, who should have charge of the City Hospital. His salary was to be "such as Council may annually annex to the office." This ordinance provided for his removal from office for malpractice, etc., as other officers might be removed. In January, 1868, Dr. Sweeney was elected hospital physician under this ordinance. The salary was then \$1,200 00, but in August, 1868, it was increased to \$1,600 00, because of certain additional duty put upon him. He served as hospital physician during 1868, and to the 5th of January, 1869. On that day the City Council, by ordinance, abolished said office. The reason for this was that they had made a contract with the Medical College of Georgia by which its faculty was to perform the duties of the hospital physician at a new hospital conveyed to the city by the college, and the old hospital was to be abolished. After this action the Mayor requested Sweeney to visit the hospital till the 13th of January, 1869, and said that then the faculty would relieve him. Sweeney notified the City Council of his willingness to do the duties of said office during 1869, and demanded his salary for 1869. Upon their refusal to pay it he sued thereon.

Besides the foregoing facts it appeared on the trial that the public patients were taken care of by one of the college

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faculty, who made monthly reports to the City Council just as Sweeney had done; but no ordinance required either of them to make such reports.

Plaintiff's counsel requested the Court to charge the jury, 1st. That said election of Sweeney was a contract between him and defendants for two years. 2d. That he could be removed from said office only for malpractice, after trial and conviction. 3d. If Sweeney was prevented from performing the contract by defendants, without his fault, he could recover the salary for 1869. 4th. That they could not remove Sweeney and put another in his place until after such trial and dismissal from office upon conviction. 5th. That before the abolition of the office could be used as a defense it must be really abolished, and if the office was not abolished, but a simple transfer was made, as a better arrangement, this could not prevent Sweeney's recovering. The Court gave all of said requests in charge to the jury.

He was requested by the defendant's counsel to charge the jury that, if the office was created by ordinance it might be abolished by a repealing ordinance. He told the jury that that was true, *provided* only such repeal did not violate rights already accrued under the contract. The jury found for the plaintiff for \$1,400 00. Defendants moved for a new trial upon the grounds that the Court erred in charging as requested by plaintiff's counsel, and in qualifying the request of defendant's counsel as he did, and for other grounds immaterial here. The Court refused a new trial, and that is assigned as error.

A. R. WRIGHT, for plaintiffs in error.

H. CLAY FOSTER, for defendant in error. The charge was right: 4 Dev. N. C. R., 18, 19.

MCCAY, Judge.

It is only in a very loose sense that the relation between the holder of an office and the public can be said to be one of contract. One of the very first ingredients of a contract is wanting, to-wit: that of mutuality. The officer may, at any time, resign, move away, or die, and the public has no remedy. So, too, the public may, at any time, discharge the incumbent, provided that discharge is within the power under the law of the *public agent* who makes the discharge. The public always acts through agents, and those agents only have such powers as the public has conferred upon them. If the public has, by law, made the officer removable at the will of some other public agent, the removal may be made. If, by law, the removal is only by some other mode than that mode must be resorted to. It is not a matter of right in the officer, but a question of power in the agent who undertakes the removal.

It was upon this that the case in *Shaw vs. Mayor and Council of Macon*, 21 Georgia Reports, 280, went. The City Council did not, by law, have the right to remove, hence, there was no removal, and the marshal was entitled to his salary. It will, we think, be found that this is the ground upon which the cases have been put, where decisions have been made, seemingly in favor of the right of the officer to his pay after removal, and not upon the ground of contract: 4 Dev. N. C. R., 18, 19; 10 Howard, 414.

It has always been held in Georgia, that the people in convention might abolish even a constitutional office. If the office be created by legislative enactment, the Legislature may abolish it; and if it be created by municipal authority, that same authority may abolish it. This is the clear deduction from the case of *Butler vs. the State of Pennsylvania*, 10 Howard, 414. See, also, 6 Sergeant's Reports, 322; 5 Watts and Sergeant, 418. We think, therefore, that, as there was evidence that this office had been abolished by the proper

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authority, the plaintiff in the suit had no right, by contract, to be interfered with, and the Court erred in qualifying, as he did, his charge, that the City Council had the right to abolish the office of hospital physician.

The right of an incumbent of an office does not depend on any contract, in the sense of a contract, in the sense of a bargain between him and the public. His right depends on the law, under which he holds. If that law be one capable of being repealed by the power which acts, the right of the officer is gone. That clause of the bill of rights, in our own Constitution, which prohibits the passage of a law affecting private rights, or rather the varying of a general law, by special legislation, so as to affect private rights, cannot affect this question, since this law, ordinance of Council, which was repealed, was not, itself, a general law, but a law creating a particular office, which the power creating it had the same power to abolish as it had to create.

Judgment reversed.

EXECUTORS OF LAWSON & LAWSON, plaintiff in error, vs.
ADMINISTRATOR OF J. W. GRUBBS, defendant in error.

When it appears from the bill that the complainant has a judgment at law for the amount of his debt, he has an adequate remedy by levy and sale of the property, and equity will not assume jurisdiction to enforce, by a decree, the collection of a judgment already obtained where the allegations set up the insolvency of the parties merely, as the process of the Court upon the judgment at law is the proper remedy; and a demurrer to such bill on the grounds stated ought to have been sustained.

Equity. Injunction. Before Judge TWIGGS. Burke Superior Court. May Term, 1871.

The case is reported in the opinion.

E. F. LAWSON; J. S. HOOK and S. H. CORKEE, for plaintiffs in error.

A. R. WRIGHT ; JOHN T. SHUMATE, for defendants.

LOCHRANE, Chief Justice.

James W. Grubbs, in his lifetime, in the year 1858, sold a tract of land to R. R. Lawson for \$5,947 00, taking his notes, with A. J. Lawson, his father, as security. R. R. Lawson died intestate, leaving a wife and several children, and A. J. Lawson died testate. The notes remain unpaid, except \$1,500 00 paid thereon in 1863. Grubbs brought suit against the representative of the estate of R. R. Lawson, and the executors of A. J. Lawson, and obtained judgment for the debt.

The question before the Court arises upon the bill filed by Grubbs, in which the above facts appear, and, further, that the widow and children of R. R. Lawson have a claim for homestead in the land sold by him, and also to dower ; and if either are set apart that the balance left will be of little or no value. He further sets up and avers in the bill that A. J. Lawson, who became the security for his son R. R., upon the notes given for the purchase-money of land did, by will, especially instruct his executors to pay Grubbs said claim as a part of his legacy to his son R. R. Lawson. He alleges that the said executors have given no bond, and are "in failing and insolvent circumstances," and that they have advertised the lands of the testator's estate for sale, which, he says, embraces the main part of the estate ; and he further avers the estates of Alexander and Robert Lawson to be "hopelessly insolvent," and, except the estate of Alexander J. Lawson, is subjected to the payment of his *fi. fa.*, he fears the loss of the whole or greater part thereof. He prays injunction, etc., which was granted by the presiding Judge. To this bill the defendants demurred upon three grounds : 1st. That there was no equity in the bill. 2d. That the bill seeks to confer upon the testator a power which, under the facts of the case, is denied him by law, to-wit : the power of

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preferring a creditor. 3d. That the complainant has a full and complete remedy at law. Upon the hearing, the Court overruled the demurrer, and this judgment we are called on to review.

Under the facts presented by the bill the complainant has a full and adequate remedy at law. It appears that he has obtained judgment against the representatives of both estates of A. J. and R. R. Lawson, and he can levy his *fi. fa.* upon either, and, by the process of the Court, recover what may be subject to the lien of his judgment, and there is no special ground alleged for the interposition of a Court of equity. The judgment of the Court, therefore, under the facts, we hold to have been error.

Judgment reversed.

J. M. MEYER, trustee, plaintiff in error, *vs.* JOHN D. BUTT & BROTHER *et al.*, defendants in error.

The rule that the judgment of a Court of competent jurisdiction is conclusive between the parties, as to the matter in issue, does not apply to a judgment against a trustee, as such, if the object of the suit be to charge the trust property with a debt for which the trustee is only personally liable, unless it appear that the *cestui que trust* is *sui juris*, and was a party to the suit, or consented to the judgment and equity will interfere to enjoin such a judgment, if it appear that, in fact, the trust-estate was not liable for the debt sued on.

Conclusiveness of judgment. Trustees. Before Judge GIBSON. Richmond county. Chambers. September, 1871.

Meyer, as trustee of Mrs. Miller, complained against Baldwin B. Miller, Jr., and Butt & Brother, as follows: She and Baldwin B. married in 1858, and lived together till the 1st of May, 1870, when, by his cruelty, she was forced to separate from him. During said time, and while he had ample property, he bought from said Butt & Brother various goods,

as she believed, upon his personal credit. He gave his individual notes therefor. They made an ante-nuptial contract, whereby all her property was settled upon her for her sole and separate use, in no way to be liable for his debts or contracts. On the 29th of October, 1870, said Butts & Brother sued Miller upon his said notes, made in 1866 and 1867, and upon an open account for goods charged to himself between March 25th and December 9th, 1870. The suit was against him as her trustee, averring that said notes and account were for supplies of necessities for the use of said trust-estate. Miller made no defense, and, on the 19th of May, 1870, a judgment by default, without evidence, was entered against him as such trustee. She had no notice of this suit. At the time said judgment was taken Butt & Brother knew that a proceeding was pending, at her instance, to remove Miller as her trustee. They and Miller fraudulently combined thus to injure the trust-estate. The consideration of said notes and the goods mentioned in said account, were not bought for the trust-estate but for Miller's own use on his individual plantation, and the credit was given to him individually. He is now insolvent. Indeed, during the greater part of the time when the goods were bought, Miller was not her trustee. In 1868, he was removed from said trusteeship; in 1870 he was reinstated, and again removed in 1871, and complainant was then appointed her trustee. The *fi. fa.* issued upon said judgment has been levied upon the trust property. She prayed that the *fi. fa.* be enjoined from proceeding.

The defendants were ordered to show cause why the injunction should not issue. Butt & Brother answered that they did not sell the goods to Miller on his personal credit, but looked to the trust-estate, that Mrs. Miller knew that the credit was for goods for the use of herself and children, and that they were crediting Miller as her trustee. She held him out as her trustee even after separation, and they had no notice of her proceeding to remove him till he was removed two days after they obtained their said judgment.

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On the 20th of March, 1870, she wrote them, "you furnished us on credit," and offered certain of her trust-estate in payment of said debts, and repeated the offer in another letter of the 15th of April, 1870. They did not accept the offer, but said they would sue her trustee, and she encouraged them to do so. They did sue him as trustee and served him as such and obtained a judgment against him. They denied all fraud and combination.

Prior to the hearing, complainant notified Butt & Brother to produce their books and correspondence with Mrs. Miller, to be used as evidence. At the hearing, Butt & Brother refused to produce the books. Complainant stated to the Chancellor that said books would show that the consideration of the notes was such goods as were not proper for an estate such as hers, described in the bill, that her letters and their replies would explain the whole case, and asked that they be compelled to produce them. The Court refused to have them produced. Complainant read an affidavit by Miller that said credit was given to him individually, when he was in good credit, and for goods with which the trust-estate had no concern or connection. He also read said ante-nuptial contract. It was admitted that Miller was removed as her trustee early in 1868, that his father became the trustee and was succeeded by Miller in December, 1869, and he was again removed two days after said judgment was rendered. The Chancellor refused to enjoin the *fi. fa.* This refusal and the refusal to compel the production of the books and letters are assigned as error.

H. CLAY FOSTER, for plaintiff in error. As to production of papers: Cobb's N. D., 470, 1135; R. Code, section 3457; 15 Ga. R., 486; Acts of 1850, 273. The averments in said suits were a positive fraud relievable in equity: R. Code, secs. 3116, 3117, 3118, 3121, 2842; 9 Ga. R., 251; 6th, 478; 1 Story's Eq. Juris., 217. Claim must be against the *trust-estate*: R. Code, sec. 3301; 28 Ga. R., 525; 30th,

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85. How far trustee may bind estate: R. Code, sec. 2308; 17 Ga. R., 223. Equity relieves against fraudulent judgment: R. Code, secs. 3116, 3120; 19 Ga. R., 94, 130; 14 John. R., 501. Equity having jurisdiction will do complete justice: 7 Ga. R., 238; 14th, 323; 36th, 332. Mrs. Miller should have been sued: R. Code, sec. 3301. Not sued, she is not bound by judgment: R. Code, sec. 3302; 17 Ga. R., 223; 2 John. C. R., 238; 1 Paige's Ch. R., 20. Equity will scrutinize a judgment: 7 Ga. R., 381; 3d, 229. In such case no presumption in favor of judgment: 9 Ga., R., 250. As to dissolving injunctions where fraud is the *gravamen* of the bill; 19 Ga. R., 270; 12th, 5; 8th, 449. As to Judge's duty in injunction cases: 11 Ga. R., 185; 13th, 8; 27th, 216; 40th, 475; 6 Fla. R., 368, 533; 1 Iredell's (N. C.) Eq. R., 195.

JOSEPH P. CARR, for defendants.

McCAY, Judge.

Did this case turn solely on the evidence of complicity or positive fraud, with intent to take an unfair advantage of Mrs. Miller, we would not interfere with the discretion of the Court. But it is clear to us, from the reasons given by the Judge, that he placed his judgment largely upon the effect of the previous judgment obtained in the Superior Court. Evidently the Judge considered *that* an adjudication of the rights of the parties, unless it were shown there was fraud in its procurement, and by fraud he meant acts of duplicity and deception, and in this we think the Judge erred.

We recognize fully the principle that a judgment between the parties is conclusive on the subject of dispute. unless attacked for fraud, and we agree that, generally, a trust-estate is bound by a judgment against the trustee. But we do not agree that this rule applies to a case where, by the very nature of the suit, it is the interest of the trustee to have the judgment rendered. Nothing is better settled than that a

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trustee can do no legal act binding the trust-estate in his own favor. Had he taken the money of the trust and applied it to the payment of his own debt the *cestui que trust* could follow it if she could find it. Had he sold the trust property in payment of it, the sale would have been void.

Can it change the principle that he has quietly sat still and allowed that to be done, under the forms of law, which, if he had done by actual interference, would have been illegal? This plaintiff in the common law suit knew all the facts. He knew that this debt was not contracted for the benefit of the trust-estate. He is also charged with notice of the law, that a married woman cannot charge her separate estate with her husband's debts, or as security for him. And in obtaining this judgment, he stands precisely in the position of a man who receives from a trustee the trust effects, knowing that the trustee is misapplying them. In such a case, the law *implies* fraud, no matter how free from duplicity or immorality, in intention, the receiver of this misapplied trust fund may be. The single fact that he has knowingly received, in payment of his debt against the trustee, the fund of the beneficiaries, charges him with implied fraud.

And we think it may be laid down as a general rule that a judgment against a trustee, in a suit where he is the sole defendant, and where the plaintiff is seeking to charge the trust-estate with debt, contracted by the trustee, for his own benefit, is *prima facie* fraudulent. Being defendant in such a suit, is foreign to the object of the trust, and this the plaintiff is bound to know. The interest of the trustee is with the plaintiff, and is a perversion of the whole intent of the trust to permit his neglect, or his act to bind the trust property for his own benefit.

We think, therefore, this judgment is, *prima facie*, not binding, and that the burden of showing the debt to be a proper charge upon the trust property, is upon the holder of the debt, independently of the judgment. The injunction

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ought not to have been dissolved, and unless it be proven that, in fact, this was a debt properly chargeable upon the separate property of the wife, the injunction ought to be perpetual.

Judgment reversed.

M. W. SPEARMAN, administrator, plaintiff in error, vs. L. M. WILSON *et al.*, executors, defendants in error.

1. It was not competent for arbitration to render an award in favor of the party, or interest, which had become the property of his son, pending the arbitration. The law which governs arbitrations demands the same freedom from all bias that applies to Judges or Courts, and the fact stated by the arbitrator, in this case, showing that, by his previous opinions expressed, his judgment had not changed by the subsequent purchase by his son, cannot make valid that which, from the fact of the purchase, when known to the arbitrator, and without notice to the other party, disqualified him to act in the case.
2. Under our laws, a Judge has no right to carry a jury into a different county from that in which they are empaneled; and any threat to do so, in case they did not find a verdict, was coercion, and deprived the jury of that free, voluntary consideration of the case invoked by the law.
3. The fact of whether a contract was entered into by Whitfield with Spearman, to devise to him certain property, by will, is one for the jury to find upon the evidence, and if they found a contract existed, equity had jurisdiction to decree damages for the breach, although it was impossible to decree specific performance in terms of such contract.
4. Under the facts of this case, if the jury found there was a contract, and a breach in the estimation of damages, it is proper to consider any advances made during the lifetime of Whitfield, distinguishing between voluntary gifts, not referential to the contract, but independent of it.
5. The altered condition of the parties, arising out of the losses to the estate of Whitfield, at his death, is a proper subject matter to be considered by the jury, in case they found a contract to have been entered into, and such breach as entitled, and Spearman to damages, under the rules of law.

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Arbitrators. Jurors. Specific performance. Damages. Before Judge ROBINSON. Putnam Superior Court. September Term, 1871.

No light would be thrown upon the opinion by a statement of the facts more in detail than appears in the opinion.

J. WINGFIELD; J. T. BOWDOIN, for plaintiff in error.

JOSHUA HILL; A. REESE, for defendants.

LOCHRANE, Chief Justice.

This was a bill filed by Spearman against the executors of Matthew Whitfield, praying specific performance of a contract alleged to have been entered into by the deceased in his lifetime, and for general relief in the premises. To this bill the answer of the defendants were filed and interrogatories taken, and, by consent, it was ordered by the Court that the cause be referred to the arbitrament and award of Junius Wingfield and Joshua Hill, and such third arbitrator as they might agree upon, providing that the award of a majority when made "shall be returned to the Court at the next term of the same, to be made the judgment of the Court *unless good cause to the contrary be then shown.*" The order further provided "*that the said arbitrators shall take the oath prescribed for arbitrators by the Code of this State,*" and which is found, Code, section 4173, to be "impartially to determine the matters submitted to them according to law and the justice and equity of the case, without favor or affection to either party." After the hearing by the arbitrators, Mr. Hill and Mr. Wingfield failed to agree, and Judge Harris, the umpire, not having arrived at any conclusion took the papers with him and subsequently notified the other two arbitrators to meet him at Greensboro. Mr. Hill did so meet him, and from high waters Mr. Wingfield alleges he was detained; the two then proceeded, in the absence of Wingfield, to make

the award. The award was, first: That the complainant's bill be dismissed at his cost. Second. Providing for counsel fees. This award was excepted to upon various grounds which we will briefly consider. 1st. That after the cause was submitted, and before the award was made, the son of Mr. Hill bought out the interest of one of the legatees under the will of Matthew Whitfield, which was known to Mr. Hill, the arbitrator, before the award was made up, and that such fact was unknown to Spearman. 2d. Because the award was made by the two in the absence of Wingfield, he being providentially absent. 3d. Upon the merits of the case, averring a misconception of the rights of the complainant by the arbitrators, etc. The case was submitted to the jury who found in favor of the award, and a motion for a new trial was made upon several grounds, which is not necessary to detail as covering the merits; but we add the sixth ground, to-wit: "Because the jury, after being out from 11 o'clock A. M., to 5 P. M., on Saturday, the last day of Court, the Judge being ready to adjourn for the term, but from the failure of the jury to agree upon a verdict, ordered them into Court and asked them if they had agreed upon a verdict or were likely to agree, to which the foreman replied they had neither agreed or were likely to agree. The Judge thereupon said that the Court would adjourn very soon, and if they did not come in with a verdict pretty soon he would try to make arrangement for their conveyance to Greensboro, or words to that effect. The jury retired and in a few minutes brought in a verdict sustaining the award." The Court, upon the hearing, overruled the motion for a new trial upon all the grounds taken, and this is the error complained of.

1. In regard to the first objection, we are satisfied it was valid. When Mr. Hill's son became the purchaser of the interest in the estate of Whitfield, the litigation in regard to which had been submitted to him as an arbitrator, and his decision in favor of such interest, went directly to the benefit of his own son, he was an incompetent arbitrator.

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It would be unjust in any case to allow any benefit to accrue to ourselves or friends from the judgment we pronounce. The purity and independence of the whole judicial system would be sapped and destroyed by the imputation of such influences. The arbitrators are judges selected by the parties. As Judges we see no middle line to stand upon, no matter how high or how low the individual, how far above or below the influence of interest or relationship. The law wisely trusts no one to decide his own case, or the case of those who stand within certain relationships. The sublime invocation of the Lord's prayer nowhere finds a more just application than with those entrusted to arbitrate or adjudge, "Lead us not into temptation." We can appreciate the statement of the arbitrator in this case that his expression of opinion was open and fixed previous to the rendition of the award and the sale to his son, and that his judgment was not changed. But the principle is clear and cannot be bent to meet exceptional cases. When this award was made, Mr. Hill was disqualified. No sane man would consent to an arbitrator whose son had bought out the interest of the opposite or adverse party. And the fact that Mr. Hill had been the attorney of Whitfield did not imply, when he was sworn as an arbitrator, that he would act as an attorney. The positions are different when a lawyer is selected as a lawyer. He may, in the fulfillment of his professional obligation, make the worse appear the better cause. It is his duty to do his best in the representation of his case. But when the lawyer is selected as an arbitrator, and he takes an oath to do justice without favor or affection, he ceases to be a lawyer to become a Judge, who has no client but conscience, and no interest but justice. We, therefore, hold in this case that Mr. Hill, when he rendered the award at Greensboro, was disqualified. Particularly would the facts of this case apply in the absence of Mr. Spearman's selected arbitrator. And while a majority, by this submission, or by the Code, may make an award, still the law contemplates the presence of all, and when not

present it ought to appear that the absence is voluntary or contumacious.

2. The Court erred in overruling the motion for a new trial, upon the ground that after the jury were brought in and answered, they had not and were not likely to agree, he stated to them if they did not bring in a verdict very soon he would make arrangements to carry them to Greensboro. This question has been decided in 31 *Georgia Reports*, 625. Under our system, from its foundation, the right of compelling jurors to agree has been limited, by the practice and usage of our Courts and the spirit of our laws, to the reasonable rules during the term of the Court which invites their consideration of the case submitted, without threats, intimidation or any species of judicial tyranny whatever. Jurors are sworn; they are an important arm of the Courts; their verdicts must be free from any involuntary influence. The Court cannot carry them about from Court to Court—he cannot take them out of the county where they are empaneled. Their duty is a laborious one; taken from their homes and business to the Court to act during the term. We see no warrant in the law to coerce them into agreement. It would be an assault upon the purity of jury trials. We recognize the great bulwark, this privilege of trial by jury, is against all sinister influences of injustice. And while Courts may detain juries and limit their action by proper and reasonable rules, so as to invoke their fullest and freest consideration of the cases submitted, still anything coercive of their free and voluntary judgment, so as to compel a verdict, would be manifestly wrong. The Judge may restrain them in their room; may limit their sustenance; may, at their request, recharge them upon the law applicable to the facts of the case; may, during the whole Court, hold them upon the case submitted, when deemed necessary. But he has no power to carry them to a distant county as jurors under guard of his bailiff, to coerce a verdict. This would be violative of the spirit of our laws. We

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therefore hold that the threat used by the Judge to the jury in this case was unauthorized and invokes a new trial.

3. In discussing the asserted merits of this case, we do not propose to entrench upon what belongs properly to the jury upon the hearing. We are invoked to say whether the facts in this case make out a contract; this is for the jury to determine under the evidence. We recognize the power of a party to agree for a valuable consideration, to do a certain thing agreed to be done by will and that Courts will enforce its specific performance in equity. This general principle we admit, and the authorities sustain the proposition: See *23 Georgia Reports* 431, and *30 Georgia Reports*, 528. But the effect of the letters relied on, coupled with the removal of the complainants to Jasper county and what transpired there, are questions depending upon facts from which the jury must find the fact of contract, if it exists. If Whitfield did make such a contract, although circumstances may have rendered its execution by specific performance unattainable, yet it does not follow, as held by the arbitrators in this case, that a bill for specific performance should be dismissed. Such is not the law, for the reason that, under our law, where equity has the jurisdiction for specific performance, and the character of the case renders the performance impossible and the contract is sustained by proof, the jury may decree damages for the breach of the contract.

4. And, under the facts of this case, we are of opinion that if the jury believed that there was a contract under the rules of law sustained by the evidence, then it would be their duty to see if there was a breach, and upon what legal relations it stood, and if the question of damages were arrived at by their previous conclusions, then it would be for them to consider, in the estimation of such damages, the amounts advanced by Whitfield in the progress of the services rendered, if any were contracted for, to Spearman on account or compensation thereof, discriminating between voluntary gifts not referential to the contract, but apart from and indepen-

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dent of it. As this case goes back for a new trial, and the effect of the judgment is to set aside the award, we intend only to foreshadow the line rather than mark the track for the consideration of the jury.

5. We do not concur with the views of the arbitrators in the opinion given for their *award*, but we do not deem it necessary to discuss what is argued as their palpable mistake of the law; as the award itself must be set aside. The bill presents an equitable case for consideration, and invokes the verdict of a jury upon the proof, in addition to what has been stated upon the subject. 1st. As to the fact of contract. 2d. Its breach. 3d. Its damages. We remark that the condition of Mr. Whitfield's estate at the time, and the present condition of his estate, by alteration of circumstance under the peculiar facts of this case, ought to be weighed in finding a verdict by the jury.

Judgment reversed.

THE MILLEDGEVILLE MANUFACTURING COMPANY, plaintiff
in error, *vs.* GEORGE S. RIVES, defendant in error.

1. Where an attachment had been issued against A, and at the trial term it was agreed that B should be substituted for A, and the cause proceed against him:

Held, That this was a dissolution of the attachment, and the cause stood upon the footing of an ordinary suit against B, with service waived.

2. An agreement, by counsel, that a certain paper described in the agreement should be used as evidence, removes all objections to the proof, and to the stamping of the writing.
3. When there was a settlement, in 1867, of a contract made in 1862, payable in Confederate currency, the basis of which settlement was the value of Confederate money at the date of the contract, which the debtor then paid in cotton, taken at thirty cents per pound, when cotton was in fact selling at twenty-six cents, and the parties agreed, in writing, that if the Courts should settle the basis to be that the true basis of settlement was the value of Confederate money at the maturity of the contract they would modify their settlement accordingly.

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The right to open the settlement is made by agreement to turn upon the settlement by the Courts of a rule that Confederate contracts are to be scaled on the basis of the rate of Confederate money at the maturity of the contract.

Held, That, before the plaintiff could recover in this case, it was incumbent on him to show that the Court had settled the rule to be as the contract provided, and, as there is no evidence to this effect, a new trial ought to have been granted.

Revenue stamps. Scaling Ordinance. Confederate debts. Before Judge ROBINSON. Baldwin Superior Court. February Term, 1871.

This suit was begun by Rives against one Waitzfelder, by attachment. The sum sworn to was \$1,600 00, and the ground for attachment was the non-residence of Waitzfelder. It was levied upon Waitzfelder's property. Plaintiff's declaration claimed that Waitzfelder owed him \$2,614 93, besides interest, for the following reasons: On the 15th of November, 1862, Rives purchased certain land from one Evans, and gave him his note for \$5,000 00. Confederate currency was the sole medium of exchange here, and it was understood between him and Evans that said note was to be discharged in that currency, at its maturity. Waitzfelder bought the note. On the 23d of February, 1867, Rives handed Waitzfelder \$3,050 25, not as payment of said note, nor as fixing the amount due thereon, but to be held subject to such rule for scaling such debts as the Courts might adopt. If it was too small he was to pay more; if too large, defendant was to repay the excess. The difference either way was to bear interest from that date. The Courts fixed the rule of scaling at the value of the Confederate currency at the maturity of the contracts. By that rule, the value of the note on the 23d of February, 1867, was but \$435 82. Waitzfelder pleaded the general issue. Before the trial, Waitzfelder had answered interrogatories, and disclosed that the note was not his, but belonged to the Milledgeville Manufacturing Company, of which he was president. By consent, said company was sub-

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stituted for Waitzfelder wherever it occurred in the record, and it was agreed that the paper hereinafter mentioned should be "received in evidence as the contract" of said company. Plaintiff's counsel moved to amend the affidavit, attachment and declaration by substituting \$2,407 66 for the amount stated in each as principal. This was allowed over defendant's objection.

Defendant's counsel then moved to dismiss the attachment, as amended, because it was not founded upon any attachment for \$2,407 66. The motion was overruled. Plaintiff's counsel offered in evidence the following writing:

"Mr. George S. Rives has settled a note, given November 15th, 1862, due December 25th, 1863. He has paid this day said note, at the scale of three for one, which was the rate, at the time the note was given, for land, to S. G. Evans or bearer. Both parties have agreed, if the Courts in general should decide that the scaling is the law, that the scaling should be counted from the time the note falls due, to be governed by the same.

(Signed)

E. WAITZFELDER."

"Witness: F. B. MOPP."

Defendant's counsel objected to the paper, because it was not stamped, because it did not specify the note, and because it was without consideration, being after the payment aforesaid. The paper was then stamped, and the objections were overruled, and the paper was read to the jury.

Rives testified, that the note mentioned in said paper was the note for \$5,000 00, mentioned in the declaration; that he bought eighteen hundred acres of land, in Hancock county, Georgia, from Evans, at \$11,000 00, paid him \$2,000 00 in Confederate currency, at par, gave his note for \$4,000 00, due one day after date, and said \$5,000 00 note; it was understood and agreed with Evans that these notes were to be paid in said currency. Defendant bought both notes. When the last one fell due, he offered to pay Waitzfelder, but he

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said he had sent the note off to buy cotton. He said the land bought was of average quality, worth \$4 00 or \$5 00 per acre, before the war. The payment made the 23d of February, 1867, was in cotton, at thirty cents per pound. He delivered a surplus of cotton, for which Waitzfelder paid him twenty-six and a half cents per pound. This adjustment took up the \$4,000 00 note, at three for one, and with *that* he was satisfied, but claims the surplus on the \$5,000 00 note.

He showed that he delivered seventeen thousand two hundred and forty-one pounds of cotton, and that, on the 25th of December, 1863, \$1 00 of gold was worth \$21 00 of Confederate money. Defendant showed that said land was worth from \$6 00 to \$7 00 per acre, before the war, and from \$7 00 to \$8 00 per acre, in the fall of 1862; that said cotton was very inferior, in bad condition, having a tare of from twenty to forty pounds per bale, and that cotton in Milledgeville that day sold from twenty-four to twenty-six cents per pound. It also appeared that Rives offered to pay, as aforesaid, in said cotton, at thirty cents per pound, if Waitzfelder would sign said paper, but not otherwise, and refused to take his notes and the \$2,000 00 in cash from Waitzfelder, and convey to him the land, saying that it was his wife's land, and was worth \$15,000 00. Gold, on the 23d of February, 1867, was at a premium of thirty-eight and a half per cent, as compared with United States currency.

The Court charged the jury, "when the contract is ascertained, the measure of recovery is the value of the contract to the holder, just as if it had been performed at the appointed time, and in the appointed currency," and read to them the Scaling Ordinance of 1865. The jury found for plaintiff \$2,500 00, with interest from the 23d of February, 1867, and costs.

Defendant moved for a new trial, upon the grounds, that the verdict was for more than was sued for, contrary to the charge of the Court and the evidence. Plaintiff's counsel

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wrote off from the verdict the excess above \$2,407 66, as principal, and the Court refused a new trial. That refusal is assigned as error.

WILLIAM MCKINLEY, for plaintiff in error.

LINTON STEPHENS, for defendant.

McCAY, Judge.

Some of the points made in this attachment, and some of the rulings of the Court, on the trial, in reference thereto, are, as we think, good objections, but we do not put our judgment upon them.

1. It is clear to us that this proceeding, in the shape it finally took, ceased to be an attachment at all. The very basis of an attachment is the levy on the defendant's property. After Waitzfelder was dropped, and the Milledgeville Manufacturing Company was substituted, by consent, *for* him, it seems absurd to call the proceeding an attachment. There is no levy on the defendant's property. The attachment is upon its face, on the ground of the non-residence of the defendant, yet the defendant is a Georgia incorporation. We think the necessary consequence of the agreement is, to dissolve the attachment, and, by consent of all parties, to treat the case as an ordinary suit, with service waived. In this view of the case, the amendment to the declaration is unobjectionable, as it is wholly within the Code, section 2429, as to amendments.

2. We are not clear that the Court was not right, in any view of it, in admitting the paper after it was stamped in the presence of the Court. The government got its tax, and that is the great object of the Revenue Act. We are not clear, however, that, to make the instrument void, under the Act, it must not affirmatively appear that the paper was not stamped with intent to evade the law. But, we think the paper was rightly admitted under the agreement of counsel.

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The very foundation of the suit, as it stands, was the consent that this paper was a valid paper and obligatory upon the defendant. To say it is void is to repudiate the very terms of the agreement.

3. We are very clear, however, that the verdict is wrong. 1st. It is inequitable in a very high degree. The amount actually paid by the plaintiff, in his note, was, at the most, not over \$2,800 00, and this in cotton, at thirty cents, when the market price was but twenty-six and one-half; this, too, in cotton badly baled, with a heavy tare, and very plainly, from the evidence, not up to the mark of a good article. A fair calculation will make the amount paid not over \$2,600 00. Yet here is a verdict for the plaintiff for \$2,500 00, with interest from the 22d of February, 1867, nearly the full amount paid. In other words, the defendant gets *nothing* for the note. It would have been better had the holder of it thrown it in the fire. We are disposed to grant large latitude to juries in their judgment of the equities between the parties, but it is absurd to say this is equity. We do not, however, think the written paper authorizes a recovery at all, except in one event, that there was proof of such a rule having been established as that Confederate contracts are to be scaled at the value of the currency when the note matured. Here was a settlement in fact. The rate of scaling was three to one. Cotton was taken at considerably more than its value. This was the agreement of the parties, both of them of age, and acting on their judgment. Many persons think such a mode of settlement is the only equitable mode, to-wit: the value of the money at the date of the contract, and very often this is true. The parties settled by that rule, but agreed that, if the Courts should settle that the true rule was the value of Confederate money at the *maturity* of the contract, the settlement should be opened. The plaintiff in the case and the Court and jury seem to have understood this written agreement to be that the parties should hereafter settle at whatever rule the Courts should establish. Such

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are not the terms of the agreement. The Courts have established that the true rule is "right in equity and good conscience," between the parties in view of all the facts. That is not the agreement. The settlement is to be opened in one contingency, to-wit: if the Courts should hold that such contracts are to be scaled at the value of the currency at the maturity of the note. There seems to have been no proof offered upon this point. We know, it is true, what the rule is as established. Is it as provided for in the agreement? Clearly not. This was a *settlement*: a fair enough one under the circumstances. The parties agreed that it should be opened in a certain contingency. Until that contingency is proved to have happened no right of action accrued.

Judgment reversed.

E. AND J. W. JOHNSON, plaintiffs in error, vs. JOHN R. KELLY, defendant in error.

1. One's habits, temper, morality, sobriety, sense, or the contrary, should be ascertained when he applies for the guardianship of an idiot. (R.)
2. In a contest for guardianship of the person of an idiot, a colored man, one applicant being a white person, and the other an only sister and nearest of kin to the ward, the proof showed that both were unobjectionable, and the Court charged the jury "that other things being equal, relations were to be preferred:"

Held, That under the Code, section 1799, this charge did not, in its full meaning, present the provisions of law for the consideration of the jury. The language of the law is "the nearest of kin by blood if otherwise unobjectionable shall be preferred." The philosophy of the law is wise, and its administration ought to be enforced; for superior advantages of wealth or intelligence in a stranger cannot justly invoke the exercise of a discretion vested by law in the Ordinary, when the nearest of kin is unobjectionable, and override the declaration of the law in favor of such nearest of kin by blood.

Evidence. Guardianship. Before Judge ROBINSON. Jasper Superior Court. April Term, 1871.

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The opinion contains the necessary facts.

GEORGE T. BARTLETT, for plaintiffs in error.

KEY & PRESTON, for defendant.

LOCHRANE, Chief Justice.

This case presents a contest for the guardianship of a colored man, who is unfortunately an idiot. John R. Kelly, his former owner, when a slave, petitioned the Court of Ordinary to have him declared an idiot, and desired to be appointed his guardian. His sister and brother-in-law appeared and claimed the right of guardianship under the Code, and, by consent, both applications were heard together, and upon the hearing the Ordinary appointed Mr. Kelly, the defendant in error, the guardian. The sister, Emeline Johnson, appealed, and the case was tried in the Superior Court. The evidence showed upon the part of both applicants nothing objectionable in character, temper or condition, and disclosed a very strong attestation of the humanity and kindness of Mr. Kelly to his former servants. Several grounds of error are assigned upon matters transpiring upon the trial, which we do not deem it necessary to discuss in detail.

1. We remark, generally, that when the question before the Court and jury is the fitness of a person for guardian, the limitation upon the inquiries within the scope of his capacity and ability is not laid down, so that the questions are pertinent. It is proper to ascertain his habits, temper, morality, sobriety, sense, and responsibility, or the contrary. And the evidence in this case was within the general scope, and we think properly admitted.

2. The jury were charged by the Judge, as the law of the case, substantially, that the appointment of a guardian ought to be made with a view to the interest of the ward, etc., and that "other things being equal, relations were to be preferred."

Upon examination of this evidence, we are satisfied that the charge of the Court misled the jury. The Code, section 1799, declares: "Among collaterals applying for the guardianship, the nearest of kin by blood, if otherwise unobjectionable, *shall* be preferred." In this case we have a poor, unfortunate, colored idiot, with the mere muscular or physical strength of a machine, when directed, capable of doing full work, and this contest comes up over the rights of the claimants to his guardianship. Is it a fair submission of the law upon the facts in such a case, to say, other things being equal, relations have the preference, as a general proposition not controlled by our Code. The principle that should govern, is not the mere pecuniary advantage of one applicant over another; this rule would give to the rich always a preference, when every day experience not only demonstrates the uncertainty of worldly treasures, but that while possessed they not unfrequently narrow the whole moral and natural manhood of our nature, trampling on its sympathies and hardening its emotions, until the transformation makes the object often capricious, suspicious and cruel. The best man is not measured in his fitness for guardianship by his acres. His humanity of heart, his deportment of justice in all his social relations, his consistency of truth, his integrity of sentiment, his sense, his unselfishness, enter into the material elements that constitute the whole character of capacity. Even as between white men and white children, the idea of adoption must not blend with guardianship; for love, the ties of blood, the affinities of relationship, the similarities of habit, taste and association ought to be weighed and considered. Is it not patent to any observer of the happiness of mankind, that it does not consist in gilded saloons, on crimson-cushioned chariots, or in the revelry of profligate dissipation, or the velvet of carpets, or softness of beds. This negro would be happier in the cabin of his sister, upon straw, and happier with the association of her uneducated and unsophisticated ideas and habits, than among white people, where his life

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would drag slowly over days of toil without the association or sympathy which a sister could give him.

The Code is emphatic. Its language is plain, and not modified by doubt: "Among collaterals applying for the guardianship the nearest of kin by blood, if otherwise unobjectionable, shall be preferred." Now the evidence shows the sister unobjectionable, and she was entitled, under the facts, to the guardianship, and it was the duty of the Court to have charged the law as to her right if unobjectionable, particularly in a case where a negro was the applicant against the white man. For, in such case, the doctrine of other things being equal could not be said to apply; for the advantages were apparent, and the dissimilarity, in many respects, unfavorable to the sister. But she was entitled to the guardianship if she was unobjectionable. Such is the Code, and the sentiment it enunciates meets with a prompt response in every breast. Judges have had great embarrassment in the decision of questions involving the rights to custody of children, and the rule of looking to the best interest of the child in the selection of guardians, even with the wisest jurists has turned out unfortunately. It is hard to set up a discretion which will stand the test. But the law wisely makes *blood* relationship or kin the test, and those who stand closest to the ward are to have the preference, not that one not so near who may be wealthier, more intelligent or educated, shall have it from these advantages. The law, in the long run, trusts to blood, if those nearest are unobjectionable. And the law trusts wisely. Argyle's love of the Tartan was cherished far from the Scottish coast; how much stronger the love of *blood* relationship? When, in the sunshine of life, all may run smooth, but while troubles gather they bring selfish aims to life. Against changes and vicissitudes of either fortune or time the truest anchor of reliance is *blood*; for the ties of affection, cemented by a common ancestry, scarcely ever snap or fly asunder when sickness invokes sympathy or poverty pleads for aid. Therefore the principle

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is a wise one, and ought to be enforced in its terms without bringing *discretion* to operate in setting aside the law upon the part of the "Ordinary." The cases in which, if necessary, he may grant letters to a stranger in blood, are cases that do not fall within the principle of collaterals applying who are unobjectionable. For this section, if the whole subject is discretionary with the Ordinary, would be meaningless and absurd. If the Ordinary may in every case (meaning every case of collaterals applying who are objectionable) give the guardianship to a stranger in blood it would violate the intention and clear meaning of the law, which declares the nearest *shall* be appointed. For if over collaterals the rule applies, it must apply over strangers. We therefore think the Court, in this case, left too much to the discretion of the jury, and, upon the facts, grant a new trial.

Judgment reversed.

MARY M. MARSHALL, plaintiff in error, vs. ELIAS S. COHEN, defendant in error.

Where a landlord rents a store in a building which, in the upper stories, was rented out to other tenants, and a water-closet, in the upper part, to which all the tenants had access, by reasons of obstructions thrown in, overflowed and damaged the goods of the tenant in the store:

Held, That the landlord was liable for the damages accruing. The fact of the act being caused by the neglect or wantonness of other tenants, when the proof showed previous notice that the closet was in bad condition, by abuse of such tenants to such landlord, the fact that it was in the premise at the time of the renting, and that the plaintiff had access to it, but did not use it, does not change the liability. It is the duty of the landlord to keep the premises free from the consequences arising ordinarily from the use of a water-closet, which becomes a private nuisance, when not properly used and attended to; and if the landlord fails, and from such cause damage ensues, he is liable.

Landlord and Tenant. Nuisance. Tried before Judge CHISOLM. City Court of Savannah. November Term, 1870.

This was an action on the case for damages, with general pleas of denial of the grievances alleged. The plaintiff testified in his own behalf as follows: Some time in the latter part of November, in the year 1869, the defendant leased to him a store and premises situate in the city of Savannah, on the north side of Broughton street, being the ground floor of a building owned and still owned by the defendant, for the sum of \$800 00 per annum; the lease was for no specific time, he then being in the possession of the property as tenant of the defendant; plaintiff kept a dry goods store in said premises; on going into his store, on the 4th day of January, 1870, he found that considerable damage had been done to his stock of goods by a leakage from the floors above; he examined and found that the leakage came from a water-closet in the third story of the building; finding the damages to be considerable, he called in three of his neighbors, who assessed the value of his goods; plaintiff did not use the water-closet, but had a separate one in his yard; a previous leakage had occurred, of which he notified defendant, and she promised to fix it; witness had been occupying the premises for about one year before he made the second agreement for rent; the second agreement was a mere verbal letting, not reduced to writing, and without any covenants or conditions of any sort. The water-closet was a nuisance.

The plaintiff closed his case, after proof of *quantum* of damage. The defendant then offered, as a witness, William Wray, who testified as follows: He is a tenant of the defendant, of a portion of the same building occupied by plaintiff; has been so for some twelve years; the water-closet was in the building, and in use long before plaintiff occupied any part of the premises; the water-closet was open and free to all the tenants of the building; the overflowing of the water was not caused by any fault of the plaintiff, or defect in the works, but from the fact that trash was thrown into the water-closet by the tenants; it was open day and night, so that any

outsider might have access to it; it was often in a filthy condition.

Robider testified as follows: Is a practical plumber; on the morning of the 4th January, 1870, when informed of the leak that had occurred in the building, went and examined the water-closet; the pipes were in perfectly good order; there was no defect whatever in the water-works; the leak was caused by throwing foreign substances down the water-closet; as soon as these were removed, all difficulty ceased and no further trouble occurred; he had told defendant before that if tenants continued to obstruct the water-closet, it would be necessary to close it altogether, but she said her tenants would object; he advised her to close it up.

Manly Hazzard testified as follows: He examined the water-closet early in the morning of the 4th of January; the water-works were in good order; the pipes were in good order; the trouble arose from things which had been stuffed in the water-closet, which caused the water to overflow; as soon as they were taken out, everything worked right, and there was no further difficulty; the closet was so dark at half-past seven o'clock in the morning that it required a light for its examination.

Williams testified as follows: He examined the water-closet on the morning when the leak occurred; it was filled with trash; he was the carriage driver of the defendant; he never saw a nastier place than the water-closet was; saw plaintiff's store and goods all wet.

The Court charged the jury as follows: "That if they found from the testimony in the case that the defendant was the owner of the whole building, and the plaintiff was the tenant of a part of said building, and that damages accrued through the leakage of the water-closet, that defendant was liable for the damages sustained; that the other tenants of the building were to be considered as the agents of the defendant in obstructing the water-closet, and that defendant was bound to keep the premises in repair."

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And the said defendant, by her counsel, then requested the said Judge to charge that the defendant was not liable if they should find that plaintiff had the same right of access to the water closet as any other tenant, which charge the Court refused to give, unless the jury found the damage was occasioned by act of plaintiff.

Defendant's counsel further asked the Court to charge that, the said defendant was not responsible, unless some agreement or covenant was proved by which the defendant had agreed to keep said store and premises in good condition, which said charge the Court refused to give. The jury found for plaintiff. The charge, and refusals to charge are assigned as error.

THOMAS E. LOYD ; A. W. HAMMOND & SON, for plaintiff in error. Landlord not liable for nuisance by tenant : Taylor's L. & T., 95 ; 38 Ga. R., 547. If tenant intended to hold landlord liable for such damages he should have so covenanted, knowing its probability of occurrence.

GEORGE A. MERCER, for defendant. See *Center vs. Treadwell*, 39 Ga. R., 210 ; R. Code, secs. 2946-2948, 2849 ; Taylor's L. & T., secs. 206, 775 ; 4 Denio's R., 311 ; 1st, 257.

LOCHRANE, Chief Justice.

This was an action brought by a tenant against the landlord to recover damages done to goods on account of an alleged nuisance kept in the upper part of a building, being a water-closet, on account of which water overflowed, and his goods below were injured. The proof shows that the water-closet complained of was upon the premises at the time the party rented the store, and the closet itself was not a nuisance, but convenience for the other tenants living in the upper part of the building. The proof shows that this damage was done, not on account of any defect in the water-closet

or its pipes, etc., but that persons using it threw obstructions into it, and thus caused the overflow and damage. The jury found for the plaintiff, and the case comes before us on the charges and refusals to charge of the Court below. The Judge charged the jury "that if they found, from the testimony in the case, that the defendant was the owner of the whole building, and the plaintiff was a tenant of a part of said building, and that damages accrued through the leakage of the water-closet, the defendant was liable for the damages sustained; that the other tenants of the building were to be considered as the agents of the defendant in obstructing the water-closet, and that defendant was bound to keep the premises in repair."

The Judge refused to charge that, if the jury found plaintiff had the same access as any other tenant, defendant was not liable, and also that the defendant was not responsible unless some agreement or covenant was proved by which the defendant had agreed to keep said store and premises in good condition.

The only question in the case is the fact whether Mrs. Marshall is liable for the damage done by the overflow of the closet under the facts in this case. It is contended that she is not, because the pipes and fixtures were all in good order, and the damage was the result of no fault of hers; and the closet being on the premises at the time of renting, that it was not covenanted by her as to its use, and to keep it free from obstructions, and that, this being the act of other tenants, she is not liable.

There is nothing clearer, as a principle of law, than that a party is liable for damages done by himself or his agents in maintaining or keeping up a private nuisance. The evidence in this case shows that this closet was, at times, in very bad order and condition, that it was kept in this condition. Wray, one of the witnesses, says it was open day and night, not only to inmates but to outsiders. Robider, the plumber, advised her to close it up. And it appears, previous to the

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damage sued for, there had been a previous leakage, of which she was notified by the plaintiff, and she promised to fix it. The continuance of the closet was for the accommodation of her other tenants who paid her rents, and her continuance of the closet was for a consideration. If she allowed a water-closet for her other tenants to remain in the condition testified to, and from this cause damage did actually occur to the plaintiff, why would she not be liable? Upon legal principles, can she do damage to one tenant by a convenience erected for others, and because these tenants so abuse the use as to cause the damage, protect herself as landlord because of want of covenant? A general principle may be recognized that one who permits a wrong to be done is responsible as he who actually does it. For, in *torts*, all are regarded as principals. This damage was the result of a nuisance kept by the landlord upon the premises. And that it was his own tenants who made it so does not change the charge or remove the liability. One who erects upon his own land anything which, by ignition, burns down the house of one adjoining, is liable. But we need not multiply cases analogous in principle; they are found all through the reports. We need not gather them together, for the extracted principle of liability is constantly recognized. We have examined the case upon the ground that it may be assimilated to that of a house rented to a tenant who violates law by keeping more gunpowder than the law allows, and by this act an explosion takes place which injures another, and, under such facts, the landlord would not be liable, but we see the distinction which marks the cases in the case of a tenant whose *own* act, not by its connection with the landlord, causes the damage. As if, in this case, the tenants had wantonly thrown down buckets of water on the floor above and caused this damage, the landlord would not be liable. But the act was produced by a water-closet which, if not kept clean and in proper order, was, *per se*, a private nuisance, and the ordinary and natural consequences of which was to produce a nuisance in the inherent

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character of the thing itself. And when there was proof, as in this case, of this consequence being known to the defendant, by information and by actual notice of a previous leak, we think the reasons of the liability appears, and that this case falls within the rule in *Treadwell vs. Davis*, 39 Georgia Reports. And we therefore affirm the judgment of the Court below.

Judgment affirmed.

A. W. STONE, plaintiff in error, vs. HENRY S. WETMORE,
defendant in error.

1. The Judge may refuse to allow a writ of *quo warranto* filed unless it makes out a *prima facie* case in favor of the petitioner. (R.)
2. General Terry did not, by his removal of Wetmore, as the Ordinary of Chatham county, and appointment of Stone thereto, convey such a title to the office as, upon the application of Stone to the civil Courts, they could enforce under the Constitution and laws of this State.
3. The facts recited in the petition for *quo warranto*, to-wit: that Stone, after the removal of Wetmore by General Terry, was appointed to the office, and filed his bond and was commissioned by the Governor, did not confer such a right to the office as Courts can recognize. The commission did not convey more than the order of appointment upon which it was based, and that appointment expired with the powers that gave it existence.
4. Appointments, under the Reconstruction Acts of Congress, to civil office by the General Commanding, was not by virtue of the Constitution of the State, but by the power of the Acts of Congress, and did not confer upon the incumbents any title to the same longer than the Acts themselves were of force.

Quo Warranto. Reconstruction Acts. Military appointments. Before Judge SCHLEY. Chatham county. February, 1871.

The facts are in the opinion.

WILLIAM DOUGHERTY AND A. SLOAN, for plaintiff in
error.

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HARTRIDGE & CHISOLM ; JACKSON, LAWTON & BASSENGER, for defendant.

LOCHRANE, Chief Justice.

It appears from the record in this case that, on the 29th of April, 1870, the Ordinary of Chatham county, who had been duly elected by the people, and commissioned by the Governor, was removed by order of General Terry, who was at the time commanding the Third Military District, and the plaintiff in error, Mr. Stone, was, by order of General Terry, appointed Ordinary, and he, under such appointment, on the 2d May, 1870, executed and filed his bond, and took the oath of office, and was commissioned as the Ordinary by the Governor of this State. On the 5th December, 1870, Wetmore, the Ordinary, who had been thus removed, took possession of the office, and went on in the discharge of the duties imposed under the Constitution and laws of this State.

The present case arises upon the application for *quo warranto*, by Stone, in the premises, calling upon Wetmore to show by virtue of what right of law he holds the office, etc. The Judge passed an order requiring Wetmore to show cause, and he answered by showing: 1st. That the petition for *quo warranto* presented no legal claim to the office. 2d. That, when he was removed, he was acting as said Ordinary by virtue of his election under the present Constitution and laws of this State, and his commission in pursuance thereof; and 3d. Because Mr. Stone was disqualified to hold the office, being United States Commissioner for United States Courts.

Upon the hearing, the Judge refused leave to file the information of *quo warranto*, and this constitutes the ground of error assigned upon which the judgment of this Court is invoked.

1. The first question raised is as to the error committed in refusing leave to file, etc. Code, section 237, recites the power of the Superior Courts "to grant for their respective

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Circuit Courts writs of *certiorari*, *supersedeas*, *quo warranto*," etc. Section 3145 declares the writ *may* be granted at any time on *proper showing made*. And section 3147 prescribes that it may issue to inquire into the right of any person to any public office, the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein."

It will be seen, by our statutory provisions, that the ancient writ of *quo warranto*, which was in the nature of a writ of right, for the king against any one claiming or usurping any office, franchise or liberty, has gone into disuse; and the granting of the writ, of leave to file, is now a question for the sound discretion of the Court, based on the "*proper showing made*." In England, the rule of Hilary Term, 1827, which was intended to limit the pleadings authorized by statute, 9 Anne, c. 20, requires objections intended to be made to the title of the defendant, to be specified in the rule to shew cause. The spirit of the law contemplates the right of the Court to refuse the writ. At the instance of a claimant to an office, it is, in no relation, a right. But the petition for leave must set out good grounds to invoke the leave of the Court. Another important element in the decision of this question is, that the petitioner appeals to the Courts for the assertion of his rights. He presents his complaint under the Constitution and laws of this State, and therefore he must show, in his petition, something upon which the Court, exercising its constitutional functions, can adjudge his right to the office. For, under this application, and the decision of ~~the Court~~, we are not called on to decide the validity of Wetmore's right to the office, but the right which Mr. Stone presents. That right is predicated upon the Acts of March and July, 1867, and supplemental Acts, by which Georgia is placed in the third military district, and the commandant of such district is clothed with certain powers, among the enumeration of which was the right to suspend or remove from civil office and detail or appoint incumbents to

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discharge the duties. The constitutionality of these Acts are put in question, as the primary proposition, to establish the fact that General Terry had no right to remove Wetmore, and consequently no right to appoint Stone. This Court does not deem it necessary to decide this question, in the view we take of the case.

I need not, then, go through with the powers incident to the National Congress, over the subject of reconstruction. We recognize the fact that the State, after the surrender of the armies of Generals Lee and Johnston, was in a condition provided for by no constitutional provision. The framers of the United States Constitution did not foresee, and did not provide for the *status* of any of the States after its subjugation to the municipal sovereignty of the nation. It was not contemplated, and therefore *stood*, where some power necessarily had to act, and the law-making power assumed the right, upon what grounds need not be determined. When William of Prussia, from his head-quarters at Versailles, on the 15th December, 1870, decreed a government for Alsace and Lorraine, it might be conceded that he had no warrant of power for the basis of such a decree, except upon the right of war. And when people invoke war as the arbiter of national rights, the conqueror, by power invoked, exercises powers not based on constitutions or laws. The trouble has been in this country trying to harmonize war and peace measures, and setting up a constitutional power to do what fell from the effects of a surrender.

2. By these acts of settlement, commonly called the Reconstruction Acts, Congress provided for the powers exercised in this case by General Terry, and we need not discuss the effect. As long as he was clothed with the power *de facto* or *de jure*, the result would be the same. These Acts conferred the power to remove, and he did it. The cause is not before us, and it is immaterial. Under the law of Congress Wetmore was removed, and under the same law Stone was appointed. It is upon the title conferred by the appointment

only, that I propose to treat. What effect of duration did it have, made under the laws that authorized it? Suppose General Terry had detailed a soldier to the duties. This was within the letter of the law, just as much as the appointment of Mr. Stone. Would it be properly inferred from the appointment, that this was filling a vacancy under the Constitution and laws, and that such detailed soldier would continue in office after the laws by their operation had expired, under which he alone could pretend to discharge the functions? Now, Stone can stand in no better place than a detailed soldier would under the laws. Suppose General Terry had removed a Judge of the Supreme Court, and detailed a Colonel of a regiment to discharge the duties, and he did so, and subsequently the removed Judge assumed his duties under the Constitution and laws, and such Colonel appealed to the civil law, through the interposition of the civil Courts, to restore him, what *title* would he have to the office by the appointment of General Terry? We think none.

3. But in this case, the view may be taken, that when General Terry came, clothed by the National Congress with powers to remove, if he did remove, that act destroyed all the rights of the occupant, and that his removal under such delegated power had all the effect of a removal by the powers known to the laws—in other words, occasioned the same vacancy—and his power to fill was commensurate with our Constitution and laws, which he came to enforce; that he carried on the State Government under the Acts of Congress, and the appointment of Mr. Stone was in fact an appointment under the Constitution to fill a vacancy; and that Stone derived by such appointment exactly what he would have derived now by appointment if Wetmore had died or resigned, and the Governor had appointed him to fill the place. In our opinion, such is not the law. Georgia, while under military rule and Reconstruction Acts, had to carry out the civil administration under the permission or coercion policy, as the case may be, by which she was governed. But when



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she was entitled to representation and, and in fact became a member of the Union, then she was entitled to equality and independence among her sisters. The officials, breathed by the times into place, went out with their authors; the appointees dropped the ermine when their authors dropped the sceptre; the commission to constitutional offices, which the General ordered, fell when the headquarters were removed with the Acts that empowered them. No other theory would be consistent with the Reconstruction Acts themselves; for the full power invoked by them had one object only, the restoration of the States. The Generals sent to carry them into effect, came only to accomplish the purposes of the Acts as a part of the political government. And these incidental powers of removal, etc., were to clothe the military with authority to remove those who thwarted the main and declared purpose. When the purpose was accomplished, the end was attained, and the whole *status* fell back into its original condition, so far as it was attainable. If General Terry had simply suspended Wetmore, would he not have assumed his duties when the powers that suspended him were themselves suspended? Now, by the record, he is in his office; he was constitutionally elected. Mr. Stone claims it by title of General Terry's appointment. The Judge held this appointment did not confer such a title to the office as invoked the enforcement of the civil powers of the Court, and the fact that the Governor, acting under the superior power of General Terry, did give a commission to Mr. Stone, does not change the effect, for the officer for the time was the creation of the General Commanding, and the Governor's commission could not convey any right, not inherent in the order of appointment consequent upon the removal.

4. The right of appointment, if it existed, existed in the power conferred by the Acts of Congress, and not by virtue of the Constitution and laws of this State. The government was not half civil or half military, nor part under the Constitution of the State and part under the Acts of Congress.

The government was military, and the continuance of the civil power was sustained by its authority, and while acting subordinate it was not an independent, but only a permissive existence. And its acts outside the Constitution derived no inherent power from being nominally civil. Therefore, we hold that the commission issued by the Governor did not, in a constitutional view, confer any power not derived by the naked military appointment of General Terry.

And, upon the facts presented, we are of opinion that the petitioner did not present such a cause, to a Court of law, as entitled him to fill the office of Ordinary of Chatham county, under the Constitution of this State.

Judgment affirmed.

ANDREW M. ROSS, plaintiff in error, vs. JOHN WILLIAMSON,
defendant in error.

1. In a proceeding by an incoming officer, who has been commissioned and sworn, against his predecessor, to compel the turning over of the books, papers, etc., of the office, as provided by sections 162, 163, 164, 165 of the Code, the Courts will not go behind the commission to inquire into the legality of the election, or the eligibility of the new officer.
2. The simple fact that an officer elect does not give his bond and take the oath of office within the time prescribed by law, is not sufficient to work a forfeiture of his right to the office; it must appear that the not giving the bond and taking the oath within the time, was by the fault or failure of the officer.

Quo Warranto. Officer's books; etc. Before Judge SCHLEY.
Chatham county. March, 1871.

Williamson averred that, in December, 1870, he was duly elected treasurer of said county, had been commissioned by the Governor as such treasurer, and qualified by taking the oath, and giving the bond required by law, yet Ross, his predecessor, refused to deliver him the books, etc., of the office.

Ross vs. Williamson.

He prayed that Ross show cause why he should not be compelled to deliver the books, etc. Ross demurred to this petition, upon the ground, that it did not aver that, at the date of said election, Williamson was eligible to said office. The demurrer was overruled.

Ross answered that Williamson was not duly elected to said office; that he was ineligible because he had been a Justice of the Inferior Court of Chatham county, prior to the war, and taken an oath to support the Constitution of the United States, and afterwards engaged in the rebellion, and, therefore, the votes for him were not to be counted; that Williamson did not take the oath and give the bond in the time prescribed by law, and Ross rightfully holds said books, etc., because his successor has not been legally qualified. He further answered that Williamson's sole remedy was *quo warranto*.

The Judge ordered the books, etc., to be delivered to Williamson. Ross asked for a *supercedas* for twenty-four hours, till he could sue out his writ of error to this Court, but the Judge refused to grant it. The said rulings of the Judge are assigned as error.

A. W. STONE, for plaintiff in error.

HARTRIDGE & CHISOLM, for defendant.

McCAY, Judge.

1. This is a proceeding, under sections 161, 166 of the Revised Code, to require the delivery of the books and papers of an office to a newly elected and commissioned officer, by the former incumbent. It is not intended as a mode of trying the right of either party to the office. That, by the long established practice of the country, is by writ of *quo warranto*. These provisions of the Code look solely to the retention of the books, papers, and other property of an office, by an incumbent against the newly elected and commissioned officer.

The first section declares that when any office is "vacated,"

etc. The record and the law of the land shows that the office, in this case, was vacated by the expiration of the term of the incumbent. He only holds after that expiration as the *ad interim* possessor until his successor is elected and *qualified*. The petition shows that the petitioner has been elected and commissioned. That is all that is required by the statute. The word "qualified," used in the first section, clearly can only mean "sworn in," and this is the sense in which it is commonly used in the Constitution and laws: Constitution, Article 3, section 1, paragraph 2. Indeed, I think this is the universal use of it, as applied by law to public officers. The commission only issues on the qualification, and hence is evidence of it. The fact of the election, the eligibility of the officer, and his qualification, all are *prima facie*, stated in a case like this, by the statement that he has been commissioned and sworn. We think, therefore, the Court was right in overruling the demurrer.

Very clearly, also, under this statute, a jury trial was not contemplated. It is a *summary* proceeding, leaving the parties to the writ of *quo warranto*. The action of the Court does not settle the right of either party to the office, but simply that a vacancy had existed, that a successor had been qualified according to the forms of law. Even if the facts were disputed, it is for the Judge to try it. The result is merely to say who shall have the books, etc., and not to decide, except, *prima facie*, the right to the *office*.

2. The answer sets up that the complainant did not take the oath and give the bond within the time required by law. We think it is, perhaps, legitimate to inquire, even in a case like this, into the question of "qualification." It is said, in section 126 of the Code, that an office is vacated if the person elect *fail* to qualify and give bond within the time prescribed by law. We are clear, however, that this means a *failure*, that it only applies to cases when the officer is in *fault*. The simple statement that the oath was not taken and the bond filed within the time is not, in our judgment, sufficient.

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The Code, section 143, in regulating the time within which such bonds shall be filed, fixes it at so many days from the election, etc. But this has never been literally construed. In many of the counties, the shortest time mentioned here (twenty days) would most frequently be consumed in getting the returns to the capital and returning the commission to the Ordinary. It often happens that the election is contested, sometimes the mail fails, sometimes the commissions lie in the office through fault of the Ordinary. An experience of many years, as a county officer, informs me that the practice generally has been to notify officers that their commissions have arrived, and it has not been usual to consider the office vacant until this notice has been given ; and this upon the idea that the officer has not *failed* until he has notice that the Ordinary is ready, prepared by the presence in his office of the commission, to take the bond and administer the oath. See the case of *Basset vs. The Governor*, 11 Georgia Reports, 207. We think, for these reasons, that the statement made in the answer that the petitioner had not taken the oath and given the bond within the time prescribed by law is not sufficient, that it ought to have further set forth that this was by *his default*. The Judge was not called upon to hear evidence because it was not claimed in the answer that the not taking the oath and giving the bond was by the fault of the complainant. Judgment affirmed.

ALFRED B. SMITH, plaintiff in error, vs. THE ORDINARY OF CHATHAM COUNTY, defendant in error.

1. A Solicitor General, elected in 1867, is estopped from claiming compensation, under a law passed in 1857, but repealed in 1866.
2. That portion of the Constitution of 1868, which confirms and makes valid the Acts of the Legislature of 1865 and 1866, was only intended to quiet doubt, and was not necessary to give them validity. In any event, as that body was a government *de facto*, in harmony with the United States, its Acts are good, *proprio vigore*.

Constitutional law. Rebellion. Before Judge SCHLEY. Chatham Superior Court. May, 1871.

By an Act of 1857, the fees of the Solicitor General of the Eastern Circuit, for the business of Chatham county, were payable out of its treasury. This Act was repealed in 1866. Smith became the Solicitor of that Circuit in January, 1867, and acted as such till August, 1870, when he presented his account for such fees, against Chatham county, to the county treasurer for payment, averring that the Act of 1866 was void, because passed by an illegal Legislature. The Ordinary, believing that the Act of 1866 was a valid law, declined to pay the account. Smith asked for a *mandamus* to compel such payment, Judge Schley refused to grant it, and that is assigned as error.

H. TOMPKINS, for plaintiff in error. The Act of 1857 was constitutional: 39 Ga. R., 578. And is still of force: Acts 1868, p. 26. This Act of 1866, repealing the Act of 1857, had no validity till confirmed by Article XI., section 3, of the Constitution of 1868: 38 Ga. R., 300; 39th, 39-41, 248, 389; 41st, 231. The Act of 1866 was not retroactive: 4 Ga. R., 211; 39th, 43; 41st, 231; R. Code, sec. 6. The Acts passed during the war, and those passed before the re-establishing civil government, are on same footing: Const. 1868; 38 Ga. R., 302; 39th, 248. All Acts passed during the suspension of civil government, were, *ipso facto*, void: 41 Ga. R., 234; 43 Ala. R., 498, 502; 5 Pet. R., 18; 5 How. R., 342, 377; Const. of U. S., Art. IV., sec. 4, Art. VI., sec. 2; Paschal's Am. Cons., 233-5; 7 Wall. R., 726, 731-2-3; 12 Ga. R., 475. The laws remained as when Georgia seceded: 43 Ala. R., 498; 6 Wall. R., 13; 7th, 726. Smith has a vested right in these fees: R. M. Charl. R., 425; 4 Ga. R., 209; 10th, 196; 39th, 43, 436, 578; 41st, 231; 2 Sandf. R., (N. Y.) 239; Cooly's Con. Lim., 277 and notes; 6 Cranch R., 133; 10 How. R., 416; 2 Story on Const., sec. 1391.

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Private Act not repealed by public general Act: 12 Ga. R., 404.

JACKSON, LAWTON & BASSINGER, for defendant. The Act of 1866 was not to further the rebellion: 7 Wall. R., 700, 32, 33. Smith held office under Constitution of 1865, and if the Legislature of 1866, under that Constitution, was illegal, by the same reasoning, Smith's appointment was void. The law, at the time he did the service, fixes his contract: 3 Parsons, 397; 20 Cal. R., 637.

McCAY, Judge.

1. The petitioner, in this case, was elected and held office under the Constitution and laws in operation in this State in 1866, 1867 and 1868. If that was no government, he was no officer. If the Legislature which passed the Act of 1866 was an illegal body, he was illegally holding office, since the Act of Congress, on which he relies, applies just as much to him as it does the Legislature, since both he and they are but different parts of the same government. Besides, the contract of the petitioner, if it be a contract, was to take the office and perform its duties for the compensation as fixed by the laws in force at the time, and under the government which gave him official existence.

2. But we do not agree that the Act of the Legislature of 1865 and 1866, if in accord with the Constitution then in operation, and not contrary to the Constitution of the United States, needed confirmation by the Constitution of 1868. For purposes of caution, and to meet possible objections, the Convention included in their confirmatory Act the whole period from 1861 to July, 1868. But the government set up in 1865 was in accord with the United States. It was either a legal civil government under the Constitution of the United States, or it was a *de facto* government, permitted and sustained by the military power which was then in possession of the State under the laws of the United States. It

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was not a rebellious organization, and it had every quality of a *de facto* government that a *de facto* government can have. It was not obnoxious to the objection of the government set up during the war, that it was in antagonism to the Constitution of the United States. If it was not a strictly legal organization, under the Constitution of the United States, (which question we do not enter into). It was at least, even according to the theory of the plaintiff, the mode and manner by which the military power exercised its control. In any event, therefore, the *mandamus* was properly refused.

Judgment affirmed.

LEE, WYLY & COMPANY, plaintiffs in error, vs. SILAS OVERSTREET'S ADMINISTRATOR, defendant in error.

When there was a written agreement that one party would furnish and the other take all the crude turpentine made on a certain plantation when delivered in lots of forty barrels and pay for the lots on delivery, and if either party failed he should forfeit \$1,000 00 :

Held, That the \$1,000 is to be considered a penalty and not liquidated damages, and on a failure of either party the actual damage is all that can be recovered.

Liquidated damages. Penalty. Before Judge SESSIONS. Pierce Superior Court. September Term, 1869.

In 1866, Lee, Wyly & Company and Overstreet made the following contract: Overstreet was to furnish them all crude turpentine, made on his farm during that year, at \$5 00 for each barrel weighing, gross, two hundred and eighty pounds, delivered at Station Seven and one-half, Atlantic and Gulf Railroad, in good order; they to give him a sight draft on Savannah upon such delivery of each car load of forty barrels. And they agreed that "either party failing to perform their part forfeits to the other the sum of \$1,000 00." Overstreet sued them for said \$1,000 00,

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averring that, at one time, he delivered thirty-seven barrels and at another thirty-six barrels of such turpentine at said place, for them, and they refused to comply with their said contract. Without proof of any special damage, he closed his case.

The Court charged the jury that said agreement was not a penal bond, but that the \$1,000 00 was stipulated damages, and that, if they found for plaintiff, they should find that sum. They found according to the charge. Said charge is assigned as error. (The cause was continued here twice for want of administration of Overstreet's estate, he having died *pendente lite*.)

HARRIS & WILLIAMS; T. M. NORWOOD; A. W. HAMMOND & SON, for plaintiffs in error, cited 3 John. Cases, 297; 7 Wheat. R., 198; 1 Pick. R., 443; 2d, 258; 3 Jones' N. C. R., 330; 2d, 15; 4 Dallas R., 149; 16 N. Y. R., 275; 5 Metc. R., 61; 17 Ga. R., 609; 6 Bos. & Cress., 216; 2 Bos. & Pull., 346; 6 Bingh. R., 141; R. Code, sec. 2889.

WARE & NICHOLS; CLARK & SPENCER; GLENN & SON, for defendant.

McCAY, Judge.

Our Code, section 2890, declares that "penalties in bonds are not liquidated damages, and even if called such, if it appear unreasonable, and not so actually intended by the parties, the law will give only the actual damages. And in all cases, if the damages are capable of computation, and is not uncertain in its character, such stipulations will not be declared penalties." The breach alleged here is a failure to take and pay for two lots of this turpentine. The damages can easily be ascertained. The difference between the price agreed upon and the worth of the article, at the time, in the market, is, *prima facie*, the measure of damages. The thing bargained about is an article of merchandise. It has always

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a market value, and the case comes exactly within the provision of the Code, which we have quoted.

If such a contract as this is not a penalty, we see no limitation at all to the stipulation which parties may make, however onerous and unconscionable. Why, if this is not a penalty, may not one bind himself in a penalty of, say \$1,000 00, to pay twenty cents per pound for all the cotton one may make, on a particular place, during any one year, and yet this is just the sort of case that begot the first interference, by Courts of equity, with such agreements.

We think this was clearly a penalty, and not liquidated damages.

Judgment reversed.

J. J. BELL *et al.*, plaintiffs in error, vs. C. C. THORPE, defendant in error.

1. Sheriffs, though out of office, are liable to rule, under the provisions of the Code.
2. It was error in the Judge, upon the trial of the traverse of the sheriff's answer, to reject evidence of the fact that the defendant in *fi. fa.* had property in his possession sufficient to satisfy the judgment, at the time of the return of *nulla bona* by such sheriff upon the execution.

Rules against sheriffs. Before Judge SESSIONS. McIntosh Superior Court. December Term, 1870.

The facts are in the opinion.

WILLIAM B. GAULDEN, for plaintiffs in error.

No appearance for defendant.

LOCHRANE, Chief Justice.

1. This was a rule against a former sheriff upon a *fi. fa.* for the collection of money. The answer of the sheriff says he has not collected the money, upon the ground that there

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was no property to levy on, and that he had used all diligence to find property. This answer was traversed, and it is set up that the present sheriff had levied a younger *fi. fa.*, sold certain property, and paid over the money thereon to the amount of \$500 00, being larger than this demand, and also that the owners are foreclosing a mortgage on lands belonging to defendant in *fi. fa.* of younger date. The case came on for trial, and movant offered to prove the property in defendant's possession, and its sale as stated. The Court rejected the evidence, and said it would be unnecessary to submit the case to the jury, as they would be controlled by his decision, and he entered the following order dismissing the rule, etc. :

“ Upon hearing the within and foregoing rule and traverse it is ordered that the same be dismissed, upon the ground that plaintiffs are too late, the sheriff having made his return of no property to be found on the 14th December, 1868, and no action taken until December, 1870, notwithstanding there was property, on which he could have levied, in the county, and which was levied on and sold 1st of March, 1870, under a junior *fi. fa.*, and proceeds, \$1,000 00, paid over to the minor plaintiffs in *fi. fa.*” Signed, and dated December 17th, 1870.

We hold that the judgment of the Court in this case was error. The sheriff was liable to rule after he left office, under the Code of this State.

2. And the evidence ought to have been admitted, and the case submitted to the jury for their consideration, under the charge of the Court, upon the law applicable to the case. The fact of a return of *nulla bona* by the sheriff when in office is not in itself such an entry as protects him from rule, and the lapse of time stated before the proceedings were instituted did not bar such motion by rule and attachment in case it could be made to appear by proof that such entry was untrue. And the evidence rejected was proper, and admissible for the consideration of the jury.

Judgment reversed.

Marshall & Brother vs. Clary.

T. B. MARSHALL & BROTHER, plaintiffs in error, *vs.* **WILLIS CLARY**, defendant in error.

1. This Court will hesitate to control the discretion of the Court below, as to a continuance, upon facts better understood by him than by this Court. (R.)
2. Where a bill of exchange was accepted conditionally, if funds of the drawer come in hand, it is for the holder of the bill to show affirmatively that funds did come in hand, and the production of a stated account between the acceptor and drawer, showing a charge against the drawer of \$500 00 cash, does not, of itself, prove that the same was the funds of the drawer, there being nothing in the account to show that at the time of this charge the acceptor was indebted to the drawer, or had his funds in hand.

Continuances. Bills of exchange. Evidence. Before Judge SESSIONS. Wayne Superior Court. May, 1871.

Marshall & Brother sued Clary upon his promissory note for \$370 26, made the 19th of July, 1868, and due one day thereafter. Defendant pleaded that plaintiffs, on the 1st of April, 1868, and until the 3d of June, 1868, held a draft by Sarvis in defendant's favor, and accepted by plaintiffs, for \$900 00, credited with \$434 98, which draft plaintiffs promised to pay, if sufficient funds of Sarvis came to their hands, and while they held said draft, plaintiffs paid Sarvis \$574 63, and he pleaded the balance due on said draft as a set-off.

Plaintiff's counsel went to the Court-house on the first day of the trial term and remained there till the afternoon, when the Judge not having arrived, and it being doubtful whether he would come, as the water courses were high, counsel left and returned to Savannah. On leaving, he turned over the case to another attorney, with the request that, if the Judge should come, to continue it.

The Judge came, and the case was called for trial. A motion to continue was made, upon the facts aforesaid, but the continuance was refused. The attorney in charge of the case demurred to defendant's plea, but the demurrer was overruled. Plaintiffs read the note to the jury and closed.

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For the defendant, one Whaley testified, that about the 2d of April, 1868, he received said draft from defendant, in a due course of trade, and presented it to plaintiffs, who promised to pay it if funds of Sarvis, the drawer, came to their hands; said they then had some funds of Sarvis. He left the draft with them. On the 3d of June, 1868, they paid him thereon \$256 65, and afterwards paid him \$168 30, and perhaps \$30 00 more, which \$30 00 was not credited on the draft. Some time thereafter, he notified Clary that said draft was not paid.

Clary testified that, before taking said draft from Sarvis, he asked plaintiffs if they would accept said draft, and they said they would. He gave them his note sued on, supposing said draft had been paid, and he believed it was paid till he got it back from plaintiffs, several months after he gave said note. He put in evidence an account current between Sarvis and plaintiffs, by which it appeared that they had sold for Sarvis over \$2,000 00 worth of lumber, (when, did not appear,) against which amount they had Sarvis charged with produce and freights, etc., at various dates, from February 29th to May 18th, 1868, among which was \$500 00 cash, on the 8th of April, 1868. He also put in evidence said draft by Sarvis on plaintiffs, in his favor, which was without date and payable at plaintiffs' convenience. These papers came in over plaintiffs' objections.

The Court charged the jury, that a partial payment by plaintiffs on the draft was a virtual acceptance of it, and the subsequent receipt of funds in favor of Sarvis, appropriated otherwise than to the payment of said draft, made plaintiffs liable to the holder of the draft for its full amount. The jury found for the defendant \$253 87, with interest from the 8th of April, 1868.

Plaintiffs moved for a new trial, upon the grounds, that the Court erred in refusing the continuance, in overruling the demurrer, in admitting said evidence, and in said charge, and because the verdict was contrary to the evidence, etc.

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The Court refused a new trial, upon Clary's writing \$132 12 off from his verdict. The refusal is assigned as error on said grounds.

WILLIAM B. FLEMING; J. D. RUMPH, for plaintiffs in error.

J. C. NICHOLS, for defendant.

McCAY, Judge.

1. Whilst this case presents strong grounds for relief, based upon the failure of the Court to grant the continuance, yet we should hesitate to control the discretion of the Court, under the circumstances, so much more within his means of forming a correct opinion than ours.

2. We do not, however, think the case went to the jury fairly for the plaintiff. Assuming all that is contended for, to-wit: that the payments, entered upon the draft by the book-keeper of the plaintiffs, amounted to a waiver of formal acceptance, (and, if he was then acting as the agent of the plaintiffs, we incline to think this sufficient,) yet, according to the defendant's own evidence, the acceptance was only conditional on the acceptor getting funds of the drawer in hand. The burden of proof was, therefore, emphatically upon the holder of the draft, to show that funds had come in hand. We do not think the stated account between the plaintiff and the drawer proves this. True, in that account there is a charge of \$500 00, 8th April, against the drawer, of cash. But *this* does not prove the payment to have been of the drawer's funds. It may have been an advance to him, or a loan. Indeed, the nature of the dealings, as shown by the account itself, makes this the probable truth of the case. The drawer of the bill was a lumberman, the plaintiffs his commission merchants. They sold him corn, paid his freight, and advanced to him various sums on his consignments of lumber. When he was in their debt, or they

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in his, does not appear. During the year he sent to them various amounts of lumber, which they sold. The account does not show when the sales took place. He, the lumberman, was not in funds with the plaintiffs until the lumber was sold in quantity to satisfy the charges against him, and leave a balance. The account does not show *when* the lumber was sold. The \$500 00 may have been, and probably was, an advance. At any rate, the simple fact that the plaintiffs paid or charged to the drawer \$500 00 does not prove that, at that time, they had funds of his on hand; and we think the Court erred in charging the jury, on the assumption that there was proof, that, at the time of this charge, plaintiffs had in hand \$500 00 of the money of the drawer. On this ground we reverse the judgment of the Court refusing a new trial.

W. W. PAYNE, administrator, plaintiff in error, vs. JAMES ORMOND *et al.*, defendants in error.

(LOCHRANE, Chief Justice, did not preside in this case.)

1. Where an action of ejectment for a lot of land, by its number in the original State survey, had been pending against three persons as joint-tenants for several years before the adoption of the new rule of Court requiring the tenants in possession in actions of ejectment to admit themselves in possession before they will be permitted to defend, and after the case was referred to the jury the plaintiffs insisted on the rule, and two of the defendants disclaimed title to the west half of the lot sued for, but admitted themselves to be in possession of the other half:

Held, That it was not error in the Court to refuse to continue the cause on motion of the plaintiff, for the reason then first brought to the notice of the Court, that the other defendant was dead, and they desired to make his representatives parties to the suit.

It was too late to continue the whole case unless the knowledge of the death had just come to the plaintiffs. The disclaimer by the living defendants, presented as to them, only an issue as to the east half of the lot sued for, which was the only thing tried. The rights of the deceased defendant are not affected by the verdict.

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2. On the trial of an action of ejectment, it was shown that a certain deed, purporting to be from the State's grantee, was lost or destroyed, and the interrogatories of a witness were offered, who swore that he had seen the deed; that it, with the original grant, had been passed to him as part of the muniments of title, on his purchase of the land, about the years 1826-1830, from the brother-in-law of the assumed maker of it; that he did not remember the witnesses, and that he thought he had sent the deed to DeKalb county for record, though he could not say it was recorded. It was in proof by other witnesses that the original grant had been in possession of the supposed maker of this deed in 1826, and not afterwards, though it was stated by a witness that the grantee had said that the grant was burned with his house. It was also in proof that, soon after 1826, the supposed maker of the lost deed ceased to give in the land for taxes with his other lands which he had previously regularly done each year since the drawing. It was also in proof that both the maker and grantee of the supposed deed were dead, and that the Court-house and records of DeKalb county had been destroyed by fire:

Held, That altogether, these circumstances were proper to go the jury as evidence worthy of consideration to show the genuineness of the deed, and to justify a charge of the Court, treating them as evidence upon that point.

3. Under the Act of 1856, when an adverse possession of lands has commenced in the lifetime of the claimant, the Statute of Limitations did not cease to run at his death (except as against his minor heirs, lunatics, *femes covert*, etc.) in favor of his estate, unless administration be taken out within four years from the death; and if administration be delayed longer than this, the five years are not to be counted out in favor of the administrator..

4. When an action of ejectment is brought by an administrator, and the defendant sets up a title by prescription commencing before the death of the testator:

Held, That in this State, even in an action at law, under the plea of the general issue, the defendant may sustain his prescriptive title by showing that the deceased left no debts, and that his heirs-at-law were all of age at the death of the intestate. And this is especially true of the full age of the heirs, and the mere existence of debts is no evidence, without objection by the administrator.

5. Section 8670 of the Revised Code, requiring the Court to arrest the cause on the filing an issue of the forgery of a deed, and to try the issue thus tendered, applies only to registered deeds, and does not cover a cause where there is no registry and the party producing the deed takes upon himself to prove the execution thereof.

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Ejectment. Continuance. Evidence. Limitation of Actions. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

The material facts in the case are as follows: On the 17th of September, 1861, ejectment was brought for land lot number seventy-five, in the fourteenth district, formerly DeKalb, now of said county, upon the demise of Payne, as administrator of John McCranie, against William McNaught, James Ormond and John Lee, tenants in possession. The defendants pleaded not guilty, and the prescription of seven years adverse possession.

At the trial, McNaught and Ormond admitted that they were in possession of the east half of said lot, and had been ever since the suit was begun. Plaintiff's counsel moved to strike the pleas, because defendants did not admit themselves in possession of the whole lot when the suit was begun. They said that Lee had died pending the suit. The motion was overruled. Defendant's counsel proposed to enter, for McNaught and Ormand, a disclaimer of title to or interest in the west half of said lot, and this was allowed over plaintiff's objection. Plaintiff's counsel moved to continue the cause till Lee's representative could be made a party. This was refused. Plaintiff then showed that the lot was granted, by the State, to John McCranie in April, 1825; that he died, and Payne was duly constituted his administrator, on the 12th of September, 1866, and showed that, in 1861, McNaught and Ormand lived on part of said lot, and Lee west of them, and there rested his cause.

Defendants read the answers of Pulliam to interrogatories, in which he testified that in 1850 James Loyd claimed a part of said lot as his, and rented it to him; that he remained on it for about two years; that Loyd put an overseer on it, and Davis and Crews, Loyd's tenants, stayed on it till Loyd sold it to McNaught & Company, in 1856.

It was shown that the Court-house of DeKalb county was

burned in 1841 or 1842, and the record of deeds was destroyed. McNaught gave a detailed account of his searching in every quarter for the deeds, from McCranie to Laslie, from Laslie to Bethune, and from Bethune to Howard, and said he had failed to find either of them.

Daniel McCranie testified that the grantor of said lot was his father, John McCranie; that he saw him have the plat and grant in 1826, at his house, and that his house and everything in it was burned up in the winter of 1826, and his father said the plat and grant were then burned up. John McCranie died in 1853, and, owing no debts, he owed none after 1846. His heirs were then all of age. He said Daniel Laslie was his uncle, and that he had heard that he was dead. It was shown that Nicholas Howard died in 1849, at Columbus, Georgia, his residence.

Defendant's counsel offered in evidence the answers of James Bethune to interrogatories, in which he testified as follows: He once saw a lot pointed out to him as said lot number seventy-five. He had the plat and grant of it and a deed to it from John McCranie to Daniel Laslie, and one from Laslie to witness, and he sold it to Nicholas Howard, with other lots. He did not remember the witnesses or dates to either of the deeds. He thought McCranie's to Laslie was made in 1826 or 1827, Laslie's to him between 1826 and 1830, and his to Howard in 1836 or 1837. He believed that he then gave Howard the said grant and deeds, and witness never saw them since. He believed that, about 1830, he sent them to DeKalb county for record, and thinks he got them back. Howard died, he thought, in 1847, at Columbus, Georgia, and he knew of no administration on his estate. Witness applied to Howard's son, the only member of the family residing in the county, for said deeds, and he said he did not have them. Witness made no other search for them. He said he got the deed from Laslie, of Telfair county, as a fee for defending him for hog stealing.

These answers were objected to, upon the ground that the

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evidence was not competent in ejectment. The objection was overruled. Plaintiff then filed an affidavit that the deed from McCranie to Laslie was a forgery, and proposed to stop the cause, and have an issue as to its genuineness tried. This was refused, and Bethune's evidence was read to the jury. Defendants next put in evidence an exemplification of a proceeding to revive a dormant judgment in favor of the Insurance Bank of Columbus against said Howard, in Muscogee Superior Court, etc. Plaintiff's counsel objected, because it did not appear that the *sci. fa.* was served on Howard. The objection was overruled. It was revived in 1848. *Fi. fa.* issued in January, 1849, was levied in May, 1849, on defendants' interest in said lot number seventy-five, by Allen E. Johnson, deputy sheriff of DeKalb county. He sold the same, and paid proceeds of sale to plaintiff's attorney, as approved by said exemplification. The defendants then put in evidence a deed purporting to be made by Jones, sheriff of DeKalb county, pursuant to the sale under said levy, conveying said lot to said Johnson. It was made in August, 1849, and recorded in October, 1861. They then read in evidence a deed from said Johnson to James Loyd for the east half of said lot, made in August, 1849, and a deed from Loyd to said Ormond and McNaught for said east half, made the 11th of November, 1856.

They then read in evidence a certificate from the Comptroller General's office, showing the tax returns of John McCranie for 1826 and 1838, and each year between them and 1841 and 1845, from which it did not appear that he gave in said number seventy-five for taxes in either of said years, and a like one by which it appeared that Laslie gave in said lot in 1826, 1827, and 1828, and did not give it in 1833, 1834, and 1835; and another showing that the books of Muscogee county were lost, except for 1845, and Nicholas Howard did not give in number seventy-five as his that year. On the question of possession, evidence was introduced showing that Bethune was here trying to sell said lot

in 1849, that Loyd and his tenant were in possession of part of said east half from 1853 till McNaught and Ormond bought it, and they had been in possession since. The details of improvements, etc., are unnecessary. The acts of ownership were such as mentioned in the requests to charge.

Plaintiff's counsel requested the Court to charge the jury as follows: "Cutting off timber, or fire-wood, or erecting a brick kiln and such like acts, is not such adverse possession as will create a statutory title to land. The thing absolutely necessary to exist, to protect the defendant, under the plea of the Statute of Limitations, is, that the defendant must, either by himself or his tenants, go into the actual possession of the land, under claim of right, and continue in the actual and unbroken possession of the land for seven years continuously, preceding the commencement of the action by plaintiff for its recovery. If different tenants, at different times, occupy lands, before a title by prescription can exist, there must be a privity between the tenants. If there is an interval, however small it may be, between the going out of one tenant and the coming in of another, and no privity between them, then the possession would not be a continuous, unbroken possession.

"When a defendant pleads the Statute of Limitations to prevent the plaintiff's recovery, the *onus* is on the defendant to sustain his plea affirmatively. If there be a doubt, a reasonable one, the jury must give the benefit of the doubt to the plaintiff. The law will not permit a party to be deprived of a plain right upon a mere doubtful claim of another.

"The time accruing between the death of a person and representation on his estate, is not to be counted against his estate, provided such time does not exceed five years, but at the expiration of the five years the limitation commences. If the evidence shows there had not been seven years' adverse possession of the land in dispute, under written evidence of title, before the death of John McCranie, the plaintiff's in-

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testate, then, at McCranie's death, the statute ceased to run, and remained suspended for five years, unless the estate was represented within that time. If five years elapsed after the death of plaintiff's intestate, and his estate was not represented, then, at the end of the five years, the statute commenced to run, and continued to run up to the commencement of the suit. In all cases where the right to sue is suspended by law, the time of such suspension is not to be computed."

The Court refused so to charge, but charged the jury as follows: "This suit is proceeding by the plaintiff, as administrator of John McCranie, to recover the east half of land, lot number seventy-five, fourteenth district, Fulton county. If the plaintiff shows to you a copy of a grant from the State to his intestate, John McCranie, for this lot of land, that makes a *prima facie* case in his favor, and if there be no valid defense to the action, would entitle him to recover. It is said for the defense, that John McCranie parted with the title to this land. If the title passed out of him during his lifetime, his administrator cannot maintain this suit. (If the title was not in him, at his death, it matters not who had it; his administrator cannot recover.) It is said that John McCranie conveyed the land to one Laslie, and that the deed is lost or destroyed. You will look to the testimony and see whether there was in existence a paper purporting to be a deed of conveyance for this land from John McCranie to Laslie. If you should be satisfied that there was, then you will ascertain from the proof whether it was a genuine, original deed. To ascertain that, you may look to all the testimony in the cause. If the testimony should satisfy you that there was in existence such a deed; that it was a genuine, original deed, made and delivered by John McCranie, and conveyed his title to Laslie, and has since been lost or destroyed, your verdict will be for the defendants. But if the proof should fail to satisfy you that John McCranie sold and conveyed the land by deed, you will pass to another branch of the defense.

“When a defendant pleads the Statute of Limitations to prevent a recovery in ejectment, the *onus* is on the defendant to sustain his plea. If there be a reasonable doubt as to that matter, the jury must give the benefit of the doubt to the plaintiff, for the law will not permit a party to be deprived of a plain right, in a case where a plain right exists upon a doubtful claim. Whether this is a plain or doubtful case, on either side, the Court expresses no opinion. To make the Statute of Limitations available, as a defense, or to create a prescriptive right, the defendants, or those under whom they claim, by themselves, or their agents or tenants, must have gone into actual possession of the land, claiming the right under some written evidence of title, that served to define his claim and to have continued peaceably, openly, notoriously and visibly, in the actual and unbroken possession of the land for seven years, continuously, preceding the commencement of the suit. The use and occupation of the land must be so notorious as to attract the attention of any adverse claimant, and so exclusive as to prevent actual occupation by another. The color of title need not be a perfect deed. It matters not how imperfect and defective the writing may be, as a deed, if it is in writing and defines the extent of the claim. It is a sign, a semblance or color of title. If it be a forged paper, or be fraudulent, and the person claiming title have notice of the fraud, it would not be a sufficient color of title. If you should find that the defendants, and those under whom they claim, had good color of title to the east half of the lot sued for, and they had such actual possession, as I have described, of a part of the east half, the law would construe their possession to extend to the whole of the east half. A deed, made by a sheriff to his deputy, to land sold by the sheriff at public sale, is not necessarily a fraudulent deed within this rule. If different tenants, at different times, occupy land before a title by prescription can exist, there must be a privity between the tenants, they must claim under the same title. If there is an interval, however

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small, between the going out of one tenant and the coming in of another, and no privity between them, the possession would not be a continuous, unbroken possession. On the other hand, if different tenants, at different times, occupy land, all claiming under the same title, and if there should be a succession of crops made on the land every year, the interval which necessarily elapses between the time of one tenant moving off, and another moving on the premises, will not work a forfeiture of the benefit of the Statute of Limitations, or break the continuity of an adverse possession. If such color of title and possession, as I have described, existed, your verdict would be for the defendants.

“If it should appear to you, from the testimony, that John McCranie was the owner of this land, and that the defendants, or those under whom they held and claimed, under written evidence of title, took actual possession of the land, and openly and notoriously and visibly, with the intention to claim title, withheld it from him, then a right of action existed in his favor, and if he failed to sue, and such adverse holding, as I have above described, existed, that right of action would be barred in seven years from the time it accrued. If, before the seven years expired, he died, and at his death, his children, or the representatives of his children, who were his heirs-at-law, were all of the age of twenty-one years, the statute would not be suspended by his death, but would continue to run against his heirs, and if they failed to sue before the expiration of seven years from the time when the right accrued to him, they, too, would be barred. If you should further find that there were no debts against John McCranie's estate, then the defendants can set up, in this case, the bar to the title of the heirs, to defeat whatever legal title the administrator may have. If you should find that the title of the heirs was barred at the commencement of this action, in the manner above shown, and that there were no debts against John McCranie's estate, your verdict will be for the defendants. By the law, as it existed at the date of these transac-

tions, if a person to whom the right to sue accrued in his lifetime, died before the suit was brought, the seven years time was not to be computed against his right from the time of his death until there was representation on his estate, provided there was representation by an administrator, duly qualified, within five years from the death.

“If, in this case, the testimony shows that there had not been seven years’ adverse possession of the land in dispute, under written evidence of title, before the death of John McCranie, then the time cannot be computed against his right from the time of his death until there was representation on his estate, provided there was an administrator, duly qualified, within five years from his death. If there was no such administration within five years from his death, the entire time would be counted. It was the general rule that, when the statute had begun to run, death did not suspend it, and an exception, such as I have named, was made, by which it was suspended from the death until representation on the estate, provided there was an administrator, duly qualified, in five years. If you should find from the testimony that the statute had begun to run before McCranie’s death, and should further find that there was no administration on his estate within five years from his death, the right of action would be barred, and the administrator could not maintain this suit. If the statute had not begun to run before his death, it would not begin to run when the right of action afterwards accrued, if administration was taken out within five years from the death, if not so taken out, it could. The Court expresses no opinion as to what has or has not been proven. The law refers the facts to you.”

The jury returned a verdict for the defendants, whereupon counsel for plaintiff moved for a new trial, upon the following grounds: Because the Court erred in refusing to strike the pleas; in allowing McNaught and Ormond to disclaim title to the west half of the lot; in not continuing the case to have Lee’s representative made a party; in admitting Beth-

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une's evidence; in not arresting the cause to try the issue of forgery of the deed from McCranie to Laslie; in admitting the exemplification as to reviving the judgment against Howard; in admitting the certificates of the Comptroller General; in refusing to charge as requested, and in charging as he did. The Court refused a new trial, and error was assigned upon said grounds.

T. W. J. HILL; R. H. CLARK; COLLIER & HOYT; JOHN D. POPE. The Court should have stopped, and tried the issue of forgery: R. Code, sec. 2670; 40 Ga. R., 687. Bethune's evidence inadmissible, a deed have been produced, and its execution proven: 30 Ga. R., 391; 40th, 687; 7th, 356; 8th, 201; R. Code, secs. 3784-5-6-7. The Statute of Limitations ceased to run for five years after McCranie's death: 15 Ga. R., 361; R. Code, sec. 4; 16 Ga. R., 674; R. M. Charl. R., 537; Acts of 1855-6, p. 235; 1 Kelly, 380; R. Code, sec. 2877.

J. M. CALHOUN & SON; L. E. BLECKLEY, for defendants. Defendants may disclaim title and possession: R. Code, sec. 3285. As to proof of contents of lost deed: R. Code, secs. 3765, 3768. No *registered* deed was offered, no paper, and therefore there could be no issue as to forgery: R. Code, sec. 2670. Comptroller's certificates admissible: R. Code, secs. 100, 3763-4; 1 Gr. Ev., sec. 484; 32 Ga. R., 575, 577. As to limitations: R. Code, secs. 2877, 2646; 1 Kelly, 542. The charge was right: 23 Ga. R., 377; 20th, 515; 7th, 590; 21st, 436; 27th, 221; 30th, 77, 78.

McCAY, Judge.

1. This action had been pending for several years before the adoption of the New Rules. The defendants had filed their plea, and, as the rule stood at the time, they were in a proper condition to defend. At the October Term, 1870, the case was called, and both sides announced ready. The

plaintiffs moved to dismiss the plea, as the defendants did not admit the possession. This the defendants, McNaught and Ormond, could not, with truth, do, as they were only in possession of the east half of the lot. What were they to do? The rule is imperative. They did the only thing in their power; they disclaimed title to the one-half they were not in possession of. This, as to *them*, abandoned that half to the plaintiff, and, for all sensible purposes, put them in position to admit their possession of the other half, and to claim their right to defend it. There can be no doubt that, thus far, there was no error. It is absurd to say that a plaintiff can so bring his suit as to force a defendant to admit himself in possession of land he is not in possession of before he can be permitted to defend that which he actually does hold and claim the ownership of. But it is said that, admitting this, it was now the right of the plaintiffs, on a suggestion of the death of the other defendants, to continue the case, that his representatives might be made parties. So far as the claim of the plaintiffs against the living defendants was concerned, this was wholly useless. They set up no claim to more than the east half. As to *them*, the plaintiff may to-day take possession of the other half, and, so far as his rights to *mesne* profits of that half was concerned, the plaintiff could have his verdict against them for whatever he might prove they had received. The plaintiff knew of the death of the other defendant before he announced ready, at least it does not appear that he did not, and chose to go on because he had sued them as joint trespassers. By this he elected to put the case in *the hands of the living defendants*. They chose to disclaim any right in the west half. Why should the plaintiff complain? As the case stood, he went to trial, claiming the whole land of McNaught and Ormond. They, so far as they are concerned, yield to him the west half. Where is the harm? How is the plaintiff hurt? The real difficulty is, that he chose to go on, to insist upon it that McNaught and Ormond were withholding the whole

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from him. For the purposes of the trial, then before the Court, he had practically discontinued his suit against Lee, the deceased. If he knew, when he went to trial, that Lee was dead, (and we must assume that he did, or his motion to continue would be put on the ground that the knowledge had just come to hand,) he elected to treat McNaught and Ormond as the sole tenants of the whole lot, and took the risk of having them disclaim title to the one-half. This would seem to be the legal result of his going on. We are not, however, disposed to hold him to this result, so far as the west half is concerned. It distinctly appears, from the record, that there was no trial as to this half, and it would be unfair to the plaintiffs to hold his case, as to that half, concluded, so far as Lee is concerned.

2. We think there was no error in admitting the interrogatories of General Bethune. As evidence of the loss of the deeds from the drawer, from his grantee, and of the deed to Howard, and of the existence and genuineness of the latter two deeds, the evidence was clearly admissible. So far as Bethune's evidence refers to the McCranie deed, (save of its loss,) there is more doubt; but, taking this evidence with the other evidence, we think it admissible. Here was a deed said to be made in 1826, the grantor and grantee both dead, the deed lost, the Court-house and records of DeKalb county burned. That a deed, *purporting* to be a deed from McCranie, existed and was in possession of General Bethune, is clear. What are the circumstances showing its genuineness? It was proven that soon after the land was drawn by McCranie, he commenced giving it in for taxes with his other lands; that he continued this until about the date of this deed, when, though he gave in other lands, he ceased to give in this, and that, though he disposed of other lands and property to his children, he made no disposition to them of this: that he had the *grant* in his possession; that it, in fact, got out of his possession, and came *with this supposed deed* to Bethune's possession from the brother-in-law of McCranie.

Considering the time which has elapsed, we think these circumstances together are evidence going to show the deed genuine, and that it was proper to submit them to the jury, and to charge upon them.

3. It cannot be concluded that, under the words of this Act, the statute stops, unless the letters are taken out in five years. This is expressly made the *condition* upon which this special privilege is granted, and, by the *terms* of the Act, an administrator must show that his letters were issued within five years after the death, before he comes within its provisions. But it is said that the evident intent of the Act is to *stop* the running of the Statute of Limitations five years, and that the *equity* of it is to count out the five years, no matter when the letters may be granted. We do not think so. The Statute of Limitations is a statute of repose, and is founded on a sound public policy. Exceptions to it ought not to be extended by the Courts. The honest resident on the land, who has, in good faith gone into possession, thinking his title was good, and who has continued, undisturbed, for seven years, in the notorious enjoyment of it, is entitled to be protected, unless the letter of the law be against him. Why should the administrator claim to have the law construed beyond its letter in his favor? As to infants, lunatics, etc., upon whom a right of action falls, the Act of 1817 stops the running of the statute. The administrator cannot, therefore, claim any equity for their sake, since they do not need his aid.

The adult heirs have no right, in equity, to shield themselves behind the administrator. No other persons are interested but creditors; they are *sui juris*, and have a *right* to administer immediately. In our judgment, the Act of 1856, stopping the statute for five years, in their favor, is as much as they have a right to ask. If they fail to take out letters in that time they do not come before the Court with that vigilance that entitles them to its power. It is a strong exercise of legislative indulgence to postpone, as against an

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innocent claimant, the period when he can feel that time will protect him. We are not disposed to go further than the plain words of the Act indicate.

4. We concur with the Court below, that under our law the defendant may, even at law, reply to the defense, by which his prescriptive title is met in this case, that the heirs at law were all of age at the death of the intestate, and that he left no debts. That in equity, this would be a good reply is the settled rule. *Murdock vs. Mitchell*, 30 Georgia, 75. Why should it not be true, also, at law? It is admitted, that under our Code (section 3027) a defendant may set up, at law, any defense that would be good in equity, and this is clearly the rule in this State.

But it is said that the equitable defense set up at law must be distinctly set forth in the pleadings. This, as a general rule, is true. Our statute, Code, section 3400, requires that the defendant shall distinctly set forth his defense.

But what is this case? It is an action of ejectment. Does the plaintiff distinctly set forth *his* cause of action as the same law requires? Indeed, it is only because, by long usage, this action has been permitted by the Courts as an exception to the rule, that the plaintiff's writ is not liable to be dismissed for a failure to do this. The whole trial is upon a fiction. This, then, is not a fact in dispute between the parties that is set forth in the plaintiff's writ.

The defendant, before he is allowed to be heard, is compelled to come into Court, and admit every allegation in the writ. It would, as we think, be meeting out justice very unequally to permit the plaintiff to prove his case under the declaration, and deny to the defendant a right to set up his defense because he does not plainly and distinctly set it forth. His title in this case, as he claims, is seven years possession under paper claim of right. This, in Georgia, is a title. To this, the plaintiff replies: "The death of his intestate stops the running of the prescription." He does this without the setting forth of the matter in his declaration, or

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in any way. Would it not be clinging very closely into the bark to say, "Oh, yes! the defendant may do this under our law; he may set up any defense at law that he may, in equity, but he must plead it?" And this, in an action of the ejectment, and that, too, when the defense only comes in by way of a rejoinder, to the plaintiff's replication? If one may be, without a setting forth, we think it is but fair that the other shall be.

Judgment affirmed.

RICHARD PARSONS *et al.*, plaintiffs in error, vs. THE TRUSTEES OF THE ATLANTA UNIVERSITY, defendants in error.
The same parties *vice versa*.

1. A mere project, or plat of land upon paper, laying off streets, blocks and houses in a city, is not itself a dedication of the streets to public use, and when there is a proposition to the city authorities to receive and adopt said streets as public streets, the dedication is not complete unless the authorities affirmatively receive and adopt the same, and this must appear by the minutes of the council.
2. The City Council of Atlanta, in laying out or receiving public streets, acts as a Court, and its proceedings can only be proven by its records; parol evidence of its action cannot be received.
3. In the absence of any formal acceptance by the public authorities of a street there must be clear proof of a continuous and notorious use for a reasonable time by the public to constitute an acceptance.
4. Where there is a controversy pending between the public authorities and a citizen as to the existence or non-existence of a public street, and the public authorities are temporarily enjoined from opening the same by bill, it is not competent for private citizens, as such, to file a new bill pending the other, to enjoin the obstruction of the streets, unless they show some special damage to themselves from said obstruction different from the injury to the public.

Streets in cities. Dedication. Injunctions. Tried Before
Judge HOPKINS. Fulton county. Chambers. September,
1871.

Parsons et al. vs. The Trustees, etc.

Richard Parsons and ten others filed a bill against the trustees of the Atlanta University, making the following averments : Complainants are citizens of Atlanta, residing on and owning lots on West Mitchell street. They complain for themselves and other citizens and property owners on said street, and for the citizens of Atlanta generally. The defendant is an eleemosinary corporation, located in said county. Its trustees own parts of land lots numbers eighty-four and one hundred and nine in said county, purchased from Edward Parsons on the 12th of November, 1869. These parts were but a portion of the body of land owned by Edward Parsons prior to such sale. In 1867, Edward Parsons had all of said land then owned by him surveyed, platted and divided into blocks, and ran streets and alleys through its length and breadth. Among these streets was an extension of Mitchell Street through said land westwardly, it being the principal thoroughfare, and most passable. Edward Parsons and his partner, Jenkins, then sold various lots to different persons fronting on said streets so platted, and a number of those purchasers, in 1867 and 1868, improved said lots by buildings, etc., costing, in the aggregate, say \$50,000 00. These purchases were made upon an understanding with Parsons and Jennings that said streets so laid out were to be public streets of the city of Atlanta. Early in 1868, the civil engineer of Atlanta placed said streets, so platted, upon the city map, and complainants and others have, since 1867, regarded said streets so laid out as public streets, and made improvements upon their lots, which would not have been made but for such understanding.

On the 30th of August, 1867, Edward Parsons, then owning the whole of said lands, with Jennings, exhibited a map of the same so platted to the Mayor and Council of Atlanta. On this map he had drawn what was called old Mitchell street, diverging from the present street and running through said land. He proposed to the Mayor and Council of Atlanta that if they would allow him to close up old Mitchell

street, he would give to them, for the benefit of the citizens of Atlanta, a right of way for the same street, though his land, as the extension of Mitchell street then appeared on his said map, and now appears on the city map. This proposition was referred to the street committee, that they might examine and report concerning the premises. They did report in favor of accepting the proposition, especially mentioning the extension of Mitchell street, westwardly, to the corporate limits of the city. Their report was adopted, and Edward Parsons closed up old Mitchell street. In said conveyance to the trustees of the said University, the lands bought by them were described as follows: "Twelve blocks, in the city of Atlanta, included between Hunter and Beckwith streets, on the north and south, Trebursey and Walnut streets on the east, and Chestnut street on the west, said blocks ranging in area, and being separated by Mitchell and Markham streets, running from east to west, and by Maple, Elm and Vine streets, running from north to south," and various other blocks, fronting on said Elm, Walnut, Beckwith and Markham streets, fully described in said conveyance. Said conveyance expressed that it was made "subject, nevertheless, to the claims, whatever they may be, of those to whom said Parsons has conditionally sold divers small tracts embraced in that above described, whose names, together with the lot or lots bought by each, the price agreed to be paid and the amount paid are here given, to-wit:" Here followed sixty-seven names, etc. The price of the lots ranged from \$180 00 to \$540 00, and the payments from \$1 00 to \$35 00. None of complainants are in the list. The deed conveyed the land in fee-simple, except that as to the streets and alleys aforesaid, there was but a quit claim.

More than a year ago the said trustees erected on each side of said extension of Mitchell street a college building. Now they are proceeding to build another, very large and costly, between those two, and immediately on said street, and intend thus to stop up said street completely.

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They prayed an injunction against such or other obstruction of said street by defendants. A general demurrer to this bill was overruled, and that is assigned as error by the trustees.

The defendants then answered the bill. They denied that Mitchell street, as extended, had ever been given to or accepted by the Mayor and Council as a street or thoroughfare, or that it was ever worked out or used by the public. They believe that Mitchell street, west of Trebursey (now Tatnall) street, together with Hunter, Markham and Beckwith streets, one or all, were tendered by Parsons to the Mayor and Council of Atlanta, in lieu of the old Mason & Turner's ferry road, which ran diagonally through said Parson's land, and the Mayor and Council accepted only Walnut street, from Mitchell to Beckwith, and Beckwith thence west to the corporate line, in lieu of said road, and in pursuance of said acceptance, worked out Walnut and Beckwith streets, and have since kept them as public streets. They refused to accept Hunter, Mitchell and Markham streets, or either of them. And this was their information when they bought and paid for said land; they were assured that such streets, except as first stated, were but imaginary streets, on paper. Complainants reside on west Mitchell street, but not on this extension of it. They bought before Parsons had ever so platted his land. (Complainants reside between the college and the city.) Defendants now claim all the land mentioned in their said boundaries, and they bought them for value, without notice of said claim. They first took from Parsons a bond for titles, on the 1st of May, 1868, in which the land is described as aforesaid, which Parsons bound himself to convey to them, upon the payment of \$12,500 00, with no reservation therein expressed but the claims of those conditional purchasers.

At the hearing complainants read various affidavits. Richard Parsons and one Turner affirmed that while Edward Parsons was in possession of said land he said that he gave

the extension of West Mitchell street to the Mayor and Council of Atlanta, in consideration of their allowing him to close up said old road, and Richard Parsons further swore that in 1867 Edward Parsons had said land platted, and sold lots on all of said streets as public streets. Draper Ross, a negro, swore that he and others, in 1867, bought lots from Parsons on said extension as West Mitchell street, and that it was represented to them as a public street. He and those others are among those mentioned in the bond for title and deed as having made conditional purchases from Parsons. And he swore that the trustees had refused to receive the unpaid portion of the price for which Parsons was to have conveyed to them the lots. These all swore that they regarded said extension as an important public street.

Bass, the then civil engineer of Atlanta, swore that in 1870 the City Council and the trustees aforesaid were in a dispute as to said extension, they put obstructions in it, and he had them removed, by the order of the Mayor and Council, who had been petitioned to keep it open; and that Edward Parsons told him that he tendered said streets to the Mayor and Council, and understood that they were accepted as public streets.

Edward Parsons swore that when he platted said land he intended that the streets as platted should be public streets, sold lots on them with that representation, and quite a number of the purchasers built upon said streets, (to-wit, the persons mentioned in his bond and deed;) and that when he gave said quit claim to the streets he had no idea that the purchasers, the defendants, would or could close them; he regarded them as useful public streets.

One Elliott swore that he had hauled wood over said extension of Mitchell street, had seen many persons travel over it, that it was for some distance fenced out from the houses as a street, and was generally considered as a public street of the city. There were several other affidavits of the same purport as to the representations of Edward Parsons and

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Jennings, his agent, when they sold said lands to said purchasers.

Complainant's counsel read the following from the minutes of the City Council: "Petition of E. Parsons and William Jennings, in relation to extension of street read and referred to street committee. August 30th, 1867. Street committee report favorably on petition of E. Parsons and William Jennings in relation to extension of Mitchell street to corporation line. 6th September 1867. A petition of citizens on Mason and Turner's ferry road in relation to opening said road within the corporate limits was referred to street committee, 13th September, 1867." Upon it, the street committee, through E. E. Rawson, chairman, on the 11th of October, 1867, "recommend that Walnut street be opened from Mitchell to Beckwith street, and then Beckwith to intersect the said ferry road," and ended with a statement of the quantity and kind of work which ought to be done to carry out this recommendation. The Clerk of the Council swore that he was present when the committee reported in favor of the petition of E. Parsons and Jennings, and that the report was adopted, though it does not so appear on the minutes, as it was in a report covering other matters which was adopted.

For the defendants, Jennings swore that their answer was true as to his conduct, and he believed it was as to that of others. Rawson swore that he and Hayden, of the street committee, examined the extensions of Mitchell, Markham, Hunter and Beckwith streets, to connect with the ferry road as proposed by Parsons and Jennings, and concluded to accept only as reported aforesaid, and that except as thus accepted the extensions were not worked or used as streets while he remained in office. Hayden swore to the same, said Jennings was with them, and they refused to accept the others (except as reported upon) because the expense of working them was too great and the location unfavorable, and that they notified Jennings and Parsons that they would not accept the others offered. He said said old road was but an

army way, made during the war, as he believed, and that the City Council worked out the streets so accepted, but would not work out the others.

Ware, the President of the College, swore that he looked carefully into the matter, and but for the repeated assurances of Edward Parsons and Jennings, that these streets were but imaginary ones, they would not have bought the property; for the object of the purchase was to fence the whole as a college campus. William Jennings swore that in the spring of 1867 he purchased all of said land from E. Parsons, it being then in the new city limits, without streets; that he requested Parsons to have it platted with the said old streets laid off as extended through it, then intending to sell lots on such streets. He desired that the Mayor and Council would open and work Mitchell, Markham, Beckwith and any other of said streets, and was willing to give them to the city if the Mayor and Council would work them out. Parsons still held an interest in the lands, and they, in August, 1870, petitioned the Mayor and Council to accept and open and work either Mitchell, Markham or Beckwith street, in lieu of said old road. It was not intended that any street should become public, except upon condition that it should be then opened and worked out so as to make it passable.

He was with Rawson and Hayden when they examined the ground, and they positively refused to accept said streets on such conditions, except Walnut and Beckwith streets. He said he sold the lots bought by the purchasers, whose affidavits are before reported, upon conditions, which they did not fulfill, and that said lots now belong to the trustees of said University. In 1868, he cancelled his trade with E. Parsons, with the agreement that he should sell said lands to the said trustees, to which body he belonged. And said purchase would not have been made but for E. Parsons' distinct assurance that he had done nothing to give the Mayor and Council a right to said extended streets in controversy, except to make said offer which was rejected.

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The quit-claim, as to the streets, was made only because E. Parsons would not warrant them as against said purchasers; but their rights have been lost under the terms of their purchases.

Mr. Francis, secretary of the board of trustees, swore that he took an active part in the purchase of said land, inquired particularly as to those streets, and learned their history as detailed above, by Jennings, both from him and Parsons; that he examined the city records and minutes, and from them and the original petition, then on file there, found that their statements were true, and but for that the premises would not have been bought; for they were bought for a campus. The petition was as Jennings has stated above. He said E. Parsons gave the quit-claim only for the reason stated by Jennings above. He said sundry citizens, in 1870, petitioned the Mayor and Council to open Mitchell street. It was laid upon the table. The trustees began building, and the Mayor and Council interfered, claiming said extension as a street, when the trustees had them enjoined, and proceeded with their work. He further said that no one of the conditional purchasers of lands on this street had complied with the terms of sale. After argument, the Chancellor refused to enjoin the trustees. This is assigned as error by the complainants. The trustees assigned as error the refusal to dismiss the bill on demurrer.

CLARK & SPENCER; NEWMAN & HARRISON, for Parsons *et al.*

COLLIER, MYNATT & COLLIER, for the trustees. For the demurrer, complainants show no special interest in the matter: R. Code, secs. 3193, 2901; 15 Ga. R., 61; 28th, 418; 39th, 214, 217; Roosevelt *vs.* Draper, 23 N. Y. R. It is for the City Council to determine what are streets: City Code, 1-19. City abates nuisances: R. Code, sec. 4024; 40 Ga. R., 87. No irreparable injury to complainants stated by bill: R. Code, sec. 3152.

McCAY, Judge.

1. There is no question, but that there may be a dedication of land to the public for public use, and that this dedication need not be by deed or writing: 6 Peters, 431, 440; 12 Ga. R., 239; 2 Greenleaf's Ev., sec. 662.

In all such cases, however, there must be an acceptance of the dedication by the public in some form. It may be that the public do not need such a street or highway; it may be an inconvenience and a burden instead of a benefit: *The State vs. Trask*. 6 Vermont R., sec. 355. *Marquis of Stafford vs. Cazney*, 7 B. & C., 257; 12 Ga. R., 239.

Especially is this true if the dedication is to be presumed from user, since the right in such case turns upon the acceptance by the user. But even in the case of a dedication by words, deeds, or acts, it would seem that there must be an acceptance of the dedication, in *some form*, by the public. The public is bound to keep its highways in order; and, in this State, a town, or city, which fails to do this is liable to damages for injuries that may happen from a failure to do this. Surely it is not in the power of any person, who pleases to *force* upon the public a highway which it does not need, and which it may, in fact, not desire to have.

Mr. Greenleaf sums up the authorities on this subject in these words: "A public road may be established in two ways: 1st. By the public authorities. 2d. By immemorial usage, or dedication. In the latter case two things must be proven: 1st. The dedication. 2d. The acceptance of it by the public." 2 Greenleaf's Evidence, 662.

Clearly this acceptance may be by the public authorities. A donor may offer to the public a street or set of streets, and the public authorities may, by their official act, accept the donation. This seems to be common sense.

2. But how is *this acceptance* to be proven? The Inferior Court, Ordinary or Mayor and Council which lays out or has

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jurisdiction of public roads, is a Court. Its decisions are the subject of *certiorari*, and it keeps a *record of its proceedings*.

It would be an unheard of doctrine to permit the proceedings of a Court *having a record*, to be proven by parol. More decidedly contrary to all principle would it be to allow the record to be contradicted by parol. See Cowen's notes to Phil. Ev., 4 vol., 205. It is plain that Parsons made a written offer in reference to these streets, to the city. What that offer was, precisely, does not appear. The petition is not produced. It does not appear what has become of it. One witness testifies that he examined it and that it was an offer of one of several streets. The clerk says he *thinks* it was an offer of all. The petition or offer was referred to the street committee, and the minutes show they reported "favorably." What was the action of the Council does not appear by the minutes.

We are very clear that it would be very dangerous to hold that this may be helped out by the memory of the clerk; especially as it does appear from the minutes that there was, within a few days thereafter, a petition upon much the same subject matter, which was also referred to the street committee, which accepted but one of these streets, and refused the others: See 6 Wendell R., 651. 4 Peters R., 349.

We recognize the position that it is not necessary to show an acceptance of a dedication by the *records* of the public authorities. On this branch of the subject we merely say, that in attempting to prove an *express* acceptance by the order of the public authorities, this can only be done by their *minutes*, and not by the recollection of *any one* as to what transpired in the Council.

We think there is enough in this bill and answers to have justified the Court in sending to a jury the question whether or not the owners of this land had, so far as they were concerned, dedicated this, as well as the other streets, to the public. True, it is disputed; but, in such a case, we would sustain a Judge in holding the parties *in statu quo* until

there was a trial. But, as we have said, the act of the parties is not sufficient of itself. There must be an acceptance of the dedication by the public. Of this, we think there is absolutely no evidence. We have said that there is nothing in the minutes of the Council.

3. Is there any user by the public? For a user, if continued for a reasonable time, would be an acceptance. The highest evidence of such user is the exercise of authority over the street by the authorities, the working of it, the treating of it as a street by the authorities. We are very much inclined to hold that this is necessary; since, on any other rule, the power of the public authorities over the subject of streets, lanes, alleys, etc., would be not in them, but in an undefined, loose body called the public, which might make a street in spite of the lawfully constituted authorities clothed by law with jurisdiction over the subject. But it is not necessary to put this case upon that ground. There is not only no evidence that this supposed street was ever worked, or any authority ever exercised or claimed over it by any portion of the city authorities, but it is clear that it was impassable, wholly unfit for a street. True, there is one affidavit to the effect that it was generally used as a street for a considerable time. But the other evidence is very conclusive against this, and the witness, doubtless, meant that he and others traveled over the Parsons land, having the line of this expected street for their general direction. Mr. Hayden and Mr. Rawson, both members of the street committee for the year, assert positively that it was not so used, that it was only by great expense that it could have been made *fit for* use, and that they both examined the matter to ascertain, at the time, its capability for a street. The whole doctrine of acceptance by user is based upon the law of estoppel. If one dedicate a street, and the public, by *use* of it for a considerable time, accept the dedication, the owner is estopped from denying his act. Now, the law of estoppel turns upon this principle, that one shall not be per-

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mitted to assert the contrary of a previous assertion of his, upon which others have acted, so as to change their *status*. Can the mere temporary use of a street by a few wood-haulers come within this principle? We lay out of view altogether any *private rights* the purchasers of lots on this street, as shown by the plat, may have had. That is a private matter, which, we suppose, they now have to set up. We see nothing in this record to show that the public ever accepted this street, in any way, either by a vote of the Council, or any act of that body, or its authorized agents, or any use of the street, as such, by the general public. We do not say that the city may not lay out a street, in continuation of Mitchell street. Doubtless it has the power to do so, as it may lay out streets through any other property. That is wholly a different question. The right of eminent domain is very broad. What we mean is, that, so far as this record goes, we think there is no street there now; that whatever Parsons may have said or done, the public has never accepted his dedication, if he made one. What the public necessities may hereafter or now require, is not the question. If the city needs the street, the law points out a mode by which it is to be acquired.

4. It appears by the record that, at the time this bill was filed, there was already pending, on the equity side of the Court of Fulton county, a contest between the City Council and the defendant to this bill about this very matter. The city had undertaken to open this ground as a public street; not to appropriate it by virtue of its authority to take private property for public use, but to open as a street already belonging to the public. The defendants filed a bill, which was sanctioned, praying an injunction against the city. This bill is still pending. Now come the plaintiffs, citizens of Atlanta, in their character as citizens, and file this bill. We see no reason to authorize this interference with the City Council. That body represents the public. These parties, as citizens, are already before the Court

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in a controversy, not only covering the very controversy made now, but actually turning upon the same point. Had the city seen fit, it could pray an injunction in that case. None of the parties to this bill have any private interest. It is only as citizens of Atlanta any one appears. Some of them, it is true, live on Mitchell Street as long laid out, but they have no more rights in this proposed street than has every citizen of Atlanta. They may be a little closer, but they have no more rights than any other citizens. We are, therefore, of opinion that the pendency of the bill between the City Council and this defendant makes it improper for mere citizens, as such, to take the controversy out of the power of the City Council, and assume control of it. We do not say that citizens may not file a bill to enjoin a public nuisance. We think there are cases in which that may be done. We put our judgment on the ground that the city, having taken hold of the matter, and they being in litigation with the defendant, it is not for any person, who may so desire, to file a new bill. One case will settle the whole.

Overruling demurrer reversed.

Refusal of injunction affirmed.

CHARLES MERIWETHER, plaintiff in error, vs. MISSOURI SMITH, defendant in error.

1. When a contract for labor was entered into on the Sabbath, and the contract was performed afterwards by the laborer:

Held, That the promissor cannot defend by setting forth the illegality of the contract.

2. When a wife, by the consent of her husband, makes a contract for her own labor, in which contract it is agreed that she is, herself, to receive the compensation, she may, under our law, sue and recover in her own name.

Contract on Sabbath. Husband and wife. Before Judge ROBINSON. Jasper Superior Court. April Term, 1871.

Meriwether vs. Smith.

Missouri Smith, a married woman, in her own name, sued Meriwether for one half of the proceeds of his cotton crop. He pleaded the general issue and payment.

She testified that Meriwether, on Sunday, told her if she would cultivate certain land with his, defendant's wife, upon certain specified terms, she should have half of the cotton crop; that she consented, upon condition that she should personally have the proceeds, and her husband with defendant agreed that she should, and Meriwether then and there said he would pay it to her in person. She performed the labor, he sold the crop and refused to pay her.

Defendant's counsel moved for a non-suit, because it appeared that said contract was made on Sunday. The Court overruled the motion. Defendant then testified that he did not contract with plaintiff, but hired her on said terms, and not on Sunday, from her husband, and paid her husband half of the crop, according to the contract. And he introduced several witnesses, who testified as he had. In rebuttal, a witness swore to the contract as plaintiff had.

Defendant's counsel requested the Court to charge the jury, that if said contract was made with plaintiff on Sunday, it was void. The Court refused so to charge, but charged that, though the contract for plaintiff's labor might have been made on Sunday, yet, if plaintiff did the work, she was entitled to the promised reward. The jury found for plaintiff. Defendant moved for a new trial, upon the grounds, the Court erred in refusing to charge as requested, and in charging as he did, and because the verdict was contrary to the law, etc. The Court refused a new trial, and that is assigned as error.

KEY & PRESTON, for plaintiff in error.

GEORGE T. BARTLETT, for defendant.

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McCAY, Judge.

1. A clear distinction is made by the authorities between a suit to enforce a promise or undertaking entered into on Sunday, and a suit on a contract made on Sunday for work and labor, and for the doing of anything, where the thing to be done is *afterwards* performed by the party. It would be a fraud in one who has received the consideration of a contract on a week day, to set up the invalidity of the contract, because made on Sunday. He reaffirms the contract by receiving the consideration. At any rate, he is bound for the value of the services: Parsons on Contracts, 2 vol., 763, 764.

2. Our Act of 1866, and our new Constitution of 1868, makes a decided change in the relation of husband and wife, as to their property, and it is very difficult to say that it does not, *ipso facto*, repeal the regulations of the Code, providing the circumstances under which the wife can get a separate interest in her labor. It was in proof here that the husband consented that his wife should work for herself and contract for herself, and that the defendant contracted with her, knowing this. It is our judgment that, under the Act of 1866, and the Constitution of 1868, this agreement gave the wife this right. It was for the jury to say, under the proof, what the truth of the matter was, and they having found for the plaintiff, we are clear that there was plenty of evidence to uphold the verdict. Judgment affirmed.

BECKFORD & HOLMAN, plaintiffs in error, vs. E. B. CHIPMAN, defendant in error.

1. A new trial will not be granted because a witness swore on the trial to a fact wholly unexpected to the plaintiff, who, at the time, knew the statement was false, and that he could so prove by a witness whose testimony he could have procured had he thought such proof was necessary. The party surprised by the statement of the witness, should have moved for a continuance. He cannot take his chances of a verdict and then claim a surprise.

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2. As there was some evidence to support the charge of the Court on the question of the acts of the defendant justifying the plaintiff in supposing an agency, and as the other proof of the agency is strong, this Court will not disturb the judgment.

New trial. Waiver. Continuance. Charge of Court. Before Judge CHISOLM. City Court of Savannah. February Term, 1871.

Chipman sued Beckford and Holman for the price of certain food for mules. They pleaded the general issue. One Pitchford testified that the account was correct; that he purchased the articles for defendant's mules by the request of Mr. Holman, and fed it to the mules. He said, under a previous contract between him and the firm, he bought and was to pay for the food for the teams himself, (though in that he had an order from defendants to plaintiffs for the food,) but that afterwards they were to pay him a different price for hauling, less what the food would cost them, but they were to buy the food, and this was bought under *that* contract by Holman's authority.

Beckford, one of the defendants, testified, giving a like history of said negotiations, but saying that Pitchford was to buy the food for the teams and pay for it, and was not to have anything charged to them. He said they gave no order to plaintiff for the first purchases, but simply wrote guaranteeing that Pitchford would pay for what he had already gotten, if plaintiff would give him time, and that, when he paid for that, he destroyed the guarantee.

The Court charged the jury that if defendants' conduct was such, in dealing with plaintiff, as to lead him to believe that Pitchford was their agent for this purchase, defendants were bound, but that the general order which had been given and destroyed was not to be considered in this connection.

The cause was submitted to the jury without argument, and they found for plaintiff.

Defendants moved for a new trial upon the grounds that

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said charge was wrong, that the verdict was contrary to evidence, etc., and because Pitchford's swearing that Holman authorized him to make the purchase took them by surprise, and Holman was absent, and could not then deny it. This was supported by an affidavit by Beckford, that he knew Holman had not given such authority, and that Holman now lived in Massachusetts, having moved from Savannah, and he would swear that he gave no such authority. The Court refused a new trial, and that is assigned as error.

A. W. STONE, for plaintiff in error.

LAW, LOVELL & FALLIGANT, for defendants.

McCAY, Judge.

1. There must be some end to litigation; and this is true, not only that parties may not be detained in Court until they become exhausted by delay, but that the public may not be compelled to give to one set of parties that attention which all have equal claims upon. Admit all that is said in this application; admit that this evidence was wholly unexpected; that this plaintiff, in good faith, had no idea this testimony would be given, can he truly say he has not been negligent? Such an excuse as this would open the door to new trials, almost without number. A man has talked with a witness, who has told him a fact. He has confidence in the truthfulness of the witness, and does not have any idea this fact, so conclusive, so certain, as he thinks it is, will not be contested—certainly will not be proven not to be a fact. And he fails to subpoena his witness, or to take his testimony. He goes to trial, finds himself mistaken, and loses his case. Is this diligence? We think not. It is the duty of a suitor to anticipate the positions and defenses of his adversary, and to be prepared to meet them. The law requires the pleadings to ratify the parties of the grounds upon which they proceed. And if evidence is offered, not covered by the

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pleadings, it may be objected to. Clearly, it was apparent here that the plaintiff might take the very ground complained of. If the defendant had the evidence to meet it, as he feels confident he has, it was his fault that he had not taken it. Besides, when this unexpected evidence came out, he could then have asked the Court to continue on the showing he now presents. It would have been in the discretion of the Court to continue. But the defendant, nevertheless, went on, with this evidence staring him in the face. We suppose he felt safe before the jury. We take it for granted he was of opinion he would get a verdict in spite of it. At any rate, he took his chances, and like many another, he was mistaken. The jury gave more weight to the testimony of the plaintiff, and less to that of the defendant, than was expected by the defendant.

2. We do not have it in our power to help him. The jury are the judges of the facts. There is a good deal of evidence in favor of this agency. We do not say it is conclusively proven, but there is enough of it to justify the verdict to save it from shocking injustice. It is not an *illegal* verdict. And upon such only can this Court reverse the Circuit Judge.

Judgment affirmed.

THE SOUTH CAROLINA RAILROAD COMPANY *et al.*, plaintiffs in error, vs. H. L. STEINER *et al.*, defendants in error.
The same parties *vice versa*.

1. We hold, from the facts disclosed by this record, that equity may take jurisdiction by bill in the nature of a bill of peace, under section 3166 of the Code, and bring all the parties, plaintiffs and defendants, into the forum, and adjust their equities and several rights by one decretal verdict, and the inquiry upon the truth of such case to cover not only past but future damages, so as to stop all future or further litigation in or about the same subject-matter, and operate as a complete inves-

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titute of the legal right, free from further claim of damages to the railroads in their use of Washington street, Augusta, for railroad purposes by steam power, within the legitimate scope of the legislative right granted to them upon their compliance with the verdict.

2. The act of the municipal authorities, sanctioned by the Legislature, gives to the railroad companies the right to use the street in controversy. But the failure by the Legislature to provide for the assessment of damages by way of compensation to the property owners on said street, does not take away the right of the party to his suit at law for damages under section 2692 of the Code.

3. While the use of a public street may be granted to railroads to lay bars of iron on to run over with trains, without endangering the street by obstructions or embankments, yet if the use of locomotives inflicts injury upon those who live on the street, by throwing smoke through the houses along the streets, or by its weight shaking them or breaking the plastering or walls, etc., and by the noise and screeching of whistles and engines, the legislative right to run over the street does not make such acts harmless, and the injury inflicted upon the legal rights of the parties is not *damnum absque injuria*. Upon the trial, the rule of evidence should be limited to actual damage. The right to use the street with reasonable obstruction in the passage of trains is permitted by law, and is not an element of damage, nor is the jolting over the iron rail an element, nor the apprehension of the safety of children, nor are possibilities in cases of sickness, nor any inconvenience to visitors, not obstructing ingress or egress, nor any fanciful or speculative damages, or sentimental injuries elements of damage. But the damage which the law recognizes must be actual, tangible and determinable by proof. And the depreciation of the property not only from obstructions to access, but by smoke and injury to walls, etc., and traceable as effect from cause and the like may be inquired into to form the total of the injury.

Judgment affirmed so far as equitable jurisdiction is sustained and the suit at law enjoined and reversed as to the conditions required to be filed in writing.

Railroad. Streets. Equity. Eminent domain. Damages. Before Judge GIBSON. Richmond Superior Court. June Term, 1871.

This cause was as follows: "The South Carolina Railroad Company," "The Georgia Railroad and Banking Company," "The Central Railroad and Banking Company of Georgia," "The Charlotte, Columbia and Augusta Railroad Company,"

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which corporation, by reason of consolidation, has succeeded to all the rights and franchises of the Columbia and Augusta Railroad Company, and the Augusta and Summerville Railroad Company, all corporations chartered by this State, or recognized by the laws thereof, complain against Henry H. Steiner *et al.*, and also against all others who may bring like suits to those hereinafter described.

They claim, and are now, and have been (the three first, actually, and last named by delegating its authority to others,) since the 9th day of November, 1867, and the Charlotte, Columbia and Augusta Railroad, since June 16th, 1869, exercising a right, severally, but under like authority, to transport railroad trains for freight and passengers, drawn by locomotive steam power over a certain railroad track in the city of Augusta, in said county, laid down in Washington street, in said city, from Reynolds street to Telfair street, and thence to the Georgia Railroad passenger depot, and to the Central Railroad freight depot, save that the said Central Railroad and Banking Company say that they have run no trains north of Greene street.

By a contract, under seal, between the City Council of Augusta and the trustees of the Academy of Richmond county, of the one part, and the South Carolina Railroad Company of the other, entered into on the 10th day of August, 1852, on certain terms therein shown, the said company was authorized to lay down a railroad track in the centre of said Washington street, from Reynolds to Watkins street, and use the same for the transportation of freight by horse power; and said track was laid down in a short time thereafter.

On the 31st day of July, 1857, by another contract between the same parties and the Georgia Railroad and Banking Company, the said company was permitted to connect their said track with the track of the said Georgia Railroad, which was accordingly done. And on the 19th day of January, 1867, under the ordinances of said city, of that date,

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said track was continued on Washington street, southward, to connect with the Central Railroad track, by the Augusta and Summerville Railroad Company.

On the 7th day of November, 1867, an ordinance was adopted by said City Council authorizing the use of steam power on said Washington street, by the said Augusta and Summerville Railroad Company. And on the 13th day of March, 1868, by an ordinance, the said City Council authorized the Augusta and Summerville Railroad Company to contract with the South Carolina Railroad Company for the use of the track of the latter company from Reynolds street to the Georgia Railroad depot, which is the same track first before described ; and, in pursuance thereof, on the 16th day of March, 1868, by a deed of lease and covenants entered into between the two said companies, the said track was leased to the said Augusta and Summerville Railroad Company during the terms of their charter, in consideration that said last named company would haul by steam the freight and passenger cars of the said South Carolina Railroad Company, between the depots of said company and the Georgia Railroad Company. And on the 2d day of March, 1868, an agreement, in writing, was entered into between the said Augusta and Summerville Railroad Company, and the said Central Railroad and Banking Company, by which the first named company agreed to transport the trains of the other between the depot of the Central Railroad and the other depots in said city. And on the 5th day of July, 1869, an agreement was entered into between said Augusta and Summerville Railroad Company and said Columbia and Augusta Railroad Company, by which the former company agreed to transport the trains of the latter between the several depots.

And on the.....day of....., 1868, by a verbal contract between the said Augusta and Summerville Railroad Company and the Georgia Railroad and Banking Company, the said former company agreed, for a valuable consideration, to transport the trains of the latter company between the

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various depots, in like manner as with the other above named companies.

And, inasmuch as the said Augusta and Summerville Railroad Company was unprovided with locomotives and engine hands of its own, by an understanding between it and the several other companies, on terms satisfactory to them, the transportation agreed to be drawn by said contracts has been actually performed by the locomotives and engine hands of the respective companies.

And this transportation of trains by authority of said ordinances, done by the consent and authority of the Augusta and Summerville Railroad Company, is the same complained of by the defendants in this bill in their several actions hereinafter named; and no other running of trains or engines has been done by them, or either of them, than according to said ordinances and contracts, and the permission of said City Council of Augusta.

And in addition to the right founded on the foregoing premises, which is common to all the companies, the Charlotte, Columbia and Augusta Railroad Company say that, by ordinance of the City Council of Augusta, adopted April 27th, 1869, the Columbia and Augusta Railroad were expressly authorized to cross the Savannah river and connect with the tracks of the Augusta and Summerville Railroad on Washington street.

The South Carolina Railroad Company and the Charlotte, Columbia and Augusta Railroad Company also say that, on the 1st day of June, 1869, a contract was entered into between them and the City Council and the said trustees of Richmond Academy by which, for a valuable consideration, the said City Council conveyed to said railroad companies, in perpetuity, severally and respectively, the right to use said track on Washington street, with steam or other power.

And all the said ordinances and contracts between said City Council and said Augusta and Summerville Railroad Company, have been confirmed by the Act of the Legislature, approved October 26th, 1870.

Washington street is sixty-five feet in width, and said railroad track is five feet in width, located in the centre of the street, and on the same level as the street, and offers no obstruction to the crossing of the street, at any point, beyond a slight jolting of vehicles ; whereas, before said track was laid, there was an open ditch or drain, from time immemorial, down the centre of said street, which effectually prevented any crossing thereof save at the crossings of other streets, which drain has been covered by the track aforesaid, at the expense of complainants.

The fee of the soil of said Washington street is in the State of Georgia, subject only to its use as a public highway by the people of this State ; said street was laid out as a street and public highway when Georgia was a British colony, on land belonging to the Proprietary Trustees, and afterwards to the Crown, and the title to the same has never passed out of the sovereign to any private person ; and they pray that any private person who asserts a right as of fee in the land covered by said street may be held to the strict proof thereof.

The foregoing premises vest in them the legal right to run their trains by steam power on said track on Washington street without responsibility for damages to any private individual for so doing.

Yet they are now, and are likely to be hereafter, greatly harassed and put to costs and expense by suits for damages by individuals claiming to be injured in depreciation of real estate alleged to be caused by the exercise of their said rights.

And already actions for damages to real estate on Washington street, caused by the running of trains as aforesaid, have been commenced against each of them severally—except the Augusta and Summerville Railroad Company—by the said defendants in this bill, being, in all, twenty-eight suits, of which all but the action of Mrs. Mary M. Clanton were brought to January Term, 1871, of this Court ; and the suit of the said Mrs. Clanton was brought to June Term, 1871.

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And all said actions are still pending, and are for damages upon the same grounds. Such actions being merely for damages for a limited period, cannot finally settle the controversies between the parties, but they are liable to continual and repeated litigation, which is contrary to the policy of the law. And moreover, in such actions, if damages are held to be recoverable, it would be impossible for a jury to assess what any one company should pay without considering the liability of the other companies, on which each one ought to be heard. And for other reasons, complete justice cannot be had under the mode of proceeding of the common law; and, therefore, complainants bring this their bill, in the nature of a bill of peace, to the end that all these matters may be heard and determined at once, and protection be afforded against a multiplicity of suits.

They pray that said defendants may, without oath, answer this bill, and that they be restrained, by the writ of injunction, from further prosecuting their said actions at law, until the further order of the Court, and that a decree may be had upon the hearing of this bill, establishing and confirming to each of complainants the right to use said railroad track for the carrying of freight and passengers by steam power, or other power, and that said defendants be perpetually enjoined from prosecuting said actions, or any future actions, on account of their so using said railroad track.

Or, if it should be determined that said defendants are entitled to damages, that they be required, respectively, to establish their claim thereto, and that their damages be assessed up to time of decree; and also, that such other sum be assessed to each as will be full compensation in the future for the perpetual use of said track, in manner aforesaid; and that complainants have the option either to pay the damages already accrued, and abandon for the future the use of steam on said street, or to pay the total sum, and thereby acquire against said defendants, their heirs, representatives and assigns a right in perpetuity to use said track with steam power.

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And that, in either event, the decree be final between the parties, and that, by the same decree, the damages to each defendant, if any are found due, be divided and apportioned between such of complainants as are sued in said actions according to equity.

To the bill was attached copies of said contracts, etc. The Chancellor ordered the defendants to show cause why the injunction should not issue according to said prayer. They demurred to the bill upon the grounds that it was multifarious and contained no equity calling for injunction.

The Chancellor ordered the injunction to issue against each of said defendants, who did not, in thirty days, file in the Clerk's office of said Court, a consent to accept the final verdict and judgment of said Court as full compensation for all damage sustained by him or her; as to each who would file such consent the injunction was refused.

The complainants say the Chancellor erred in not granting the injunction unconditionally, and defendants say that he erred in not dismissing the bill and in granting any injunction.

WILLIAM T. GOULD; W. HOPE HULL; JOHNSON & MONTGOMERY; D. JACKSON; FRANK MILLER, for the railroad companies. Multiplicity of suits ground for injunction: R. Code, sec. 3166; Story's Eq. Juris., secs. 853, 854; 2 John, C., 281; Adams' Eq., sec. 201. The injury was *damnum absque injuria*: 28 Ga. R., 46; 34th, 326; 5 Rich., 583. Prospective damages may not be recovered: 15 Ga., 61. The damages are consequential: R. Code, secs. 3016, 3017. The claim is for damages for a nuisance authorized by law, and, therefore, bad: 28 Ga., 418; 15th, 61; 1 Epp. R., 148; 2 Gray, 54-339. The street belonged to the State and defendants cannot recover for a use of it permitted by the State: 32 Conn. R., 579; 33 Missouri R., 128; 3 Bar., 459; 10th 26; 7th, 508; 8th, Dana R., 301; R. M. Charlton's R., 342-350; 33 Ga. R., 617. Defendants, being citizens, are

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bound by action of the city authorities: 5 Ga. R., 569; 2 Kent's Com., 293; 3 Tenn. R., 592; 13 Bar., 646. The granting the permission to use said street, as aforesaid, is not exercising the right of eminent domain: 10 Bar., 26; 3d, 458; 13th, 646; 37th, 357; 38th, 369; 4 How. Pa., 182; 5 Rich., 583; 33 Miss. R., 128; 29 Ill. R., 279; 32 Conn., 579; 12 Ind. R., 552.

HOOK & GARDNER; C. SNEAD; CLARK & SPENCER; McLAWS & GANAHL, for defendants. The railroads claim against public right, and, therefore, cannot enjoin: 2 Story's Eq., sec. 858; Maddox Ch., 171. When bill of peace lies and to avoid multiplicity of suits; 2 Story's Eq. Juris., secs. 853, 859; 2 John Ch. R., 281-2. Does not lie till complainants' rights are clear and established at law; 10 Ga. R., 395. Legal title not established in Court of equity; 2 John R., 578; 2 Bro. P. C., 59. Defendants entitled to jury trial at law: 3 John R., 604, 590, 596. As to multiplicity of suits see: R. Code, secs. 3166, 3167, 3173, 3191, 3197; 2 Kelly, 419; 1 Dan. Eq. Pr., 437, 450; Story's Eq., sec. 225; 3 M. & Craig, 85; 2 Bou. Dic., 193. As to rights of lot owners to damages for obstructing streets: Cooly's Con. Lim., 544, 553; 9 Ind. R., 433, 467; 12th, 551; 14 Conn. R., 146; 15th, 312; 16 Ind. R., 441; 2 Dutcher, 148; 16 Wisconsin R., 225. As to nuisances: R. Code, secs. 2946, 2947, 2947.

LOCHRANE, Chief Justice.

1. This case comes before the Court upon a bill of exceptions, filed by both the parties, to the judgment of the Court below. The authorities of the city of Augusta entered into a contract with these various roads by which they permitted them the use of a certain street, known as Washington street, in Augusta, to run their cars to carry freight and passengers through that city, along that street. Several of the property owners on the street brought suits at common law for dam-

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ages against the railroad companies. This bill was filed by the companies in the nature of a bill of peace, to bring all the parties into a Court of equity, and prays an injunction against them on the ground that they had no right of action, this permission having been first granted by the municipal authorities of the city, and afterwards ratified by the Legislature of the State; alleging that they were in the exercise of their legal rights, and such rights were not the subject-matter of a suit for damages, inasmuch as the Act of the Legislature ratifying the act of the authorities of the city of Augusta, in giving the railroads the right to this street, contained no provision for the assessment of damages for compensation. The Court maintained the bill and refused to dismiss it for want of equity, holding that it was in the nature of a bill of peace, and he could maintain jurisdiction in it.

The railroads excepted to his decision on the ground that he held a right of action accrued to those parties. The others excepted on the ground that he had fettered their legal rights with this illegal condition he had imposed upon them.

We hold, from the facts disclosed by this record, that equity may take jurisdiction, by bill in the nature of a bill of peace, under section 3166 of the Code, and bring all the parties, plaintiffs and defendants, into the forum, and adjust their several rights by one decretal verdict; and the inquiry upon the trial of such case will not only cover past, but future damages, so as to estop all further or future litigation in or about the same subject-matter, and operate, upon compliance with such verdict, as a complete investiture of the legal rights, free from further claim of damage against the railroads in their use of Washington street, Augusta, for railroad purposes, within the legitimate scope of the legislative right granted to them.

2. The controlling question made by this record, and upon which all others hinge, is, whether the railroad companies are liable for damages to the holders of property along Washing-

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ton street, in the city of Augusta, by the use of the street by them for railroad purposes. This question is one of vital importance in its consequences, and in the adjudication of the principles involved in it. The previous decisions of this Court upon questions arising under the use of the street, by these railroad companies, relieves the question of many auxiliary subjects, and leaves it to be decided upon broad principles of law. The fee to the street in question is conceded to be in the State. That the city authorities of Augusta and the Legislature have granted this right to the railroad companies is equally admitted. That, by reason of such legislation, such use of the street is not a public nuisance has been determined by this Court. That the action of the Legislature makes no provision for compensation or assessment for damages, is a fact unquestioned.

And the case, therefore, presents itself upon a naked legal principle as to whatever the use of a public street in an incorporated city can be granted to railroads to run their cars over by steam power by the municipal authorities, and, when ratified by the Legislature, will such municipal and legislative permission prevent suits for damages against such roads by property holders abutting on said street.

And *is the silence* of such legislative act in regard to compensation a denial of the right to claim damages at common law? The argument concedes that suit may be instituted for damages by the lot owners, if the use of the street by the railroads denies to such owners free ingress to and egress from their property over and upon such streets. But, it is contended with great ability, and upon a large array of authority, that, in the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting any person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damages to other persons in their property or business: *Redfield on Railways*, 291. And, in support of this proposition, cases are relied on decided by this Court: 28 *Georgia Re-*

ports, 418, and 34 *Georgia Reports*, 327. The basis of these recognized principles is, that where *property* of the individual is not taken for the public use, the injury resulting from the legitimate exercise of a lawful employment, working injury, is *damnum absque injuria*.

If the property were taken, the right to compensation cannot be denied, for it is constitutionally guaranteed, and the Legislature limited in that respect. A very delicate question arises upon construction, as to whether there can be a taking within the constitutional inhibition of rights and easements, which are a part of the necessary use, to the full enjoyment of the property, without compensation. If the track lay upon an inch of ground belonging to another, it is so sacredly guarded that no power, State or national, could appropriate it. And yet, by the admission of the principle contended for, a man may be driven from his home and household gods. Trains, freighted and driven by steam, with gusts of thick smoke through his windows, and screaming along in front of his door, may affect his health and destroy his peaceful enjoyment of his property, and he is remediless. Are not these equivalent, in the construction of law, to a taking? Cooley, in his *Constitutional Limitations*, a work of great ability, and entitled, from its thorough analyzation of all the subjects upon which it treats, to great consideration, says: "Any injury to the property of an individual, which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation:" C. C. L., 554; 14 Coms., 146. But the idea suggested is, that the Legislature must have provided for the compensation, fixed a rule of damages or mode of ascertainment. And, again, while the grant of the right by the Legislature prevents the act done from being regarded a nuisance, we are of opinion it is not a logical or legal consequence of such grant, that it may not inflict injury or damage. The admission of the one is not the necessary exclusion of the other. And we, therefore arrive at the conclusion that, when the State grants at

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right, the use of which works an injury to another, and the law provides no mode of assessing compensation for such an injury, the right of suit for damages, if any can be proven, as we will hereafter discuss, is not taken away by such law.

3. Now, by contract, purchasers of property on Washington street acquired, by ownership, a right to the free use of it for all purposes, and it makes no difference where the fee to the highway resided. The use is the subject-matter of disturbance. It will not be doubted that a public street is for the use of the public, and all obstructions thereon are treespases in law. And in these days of progressive improvements, we admit the legality for public use of such streets, by laying an iron bar upon them, to facilitate conveyance, by permitting cars to run over them. The enlightened opinion of the world recognizes this appropriate use; and we indorse the authorities of Judges and publicists on this subject. We need not pause to notice the growing tendency of Courts to shield corporations from all prejudiced assaults through the forms of law. Monopolies are evidences of civilization, and invoke no captious criticism at my hands.

But, after a careful review of the authorities presented, I am not satisfied that the use of a public street in a city by steam power, is within the legitimate use of such street. I think the streets may be used, and bars laid upon them, and cars drawn over them by *horses*; but there is something in a *locomotive power*, in throwing smoke into the houses along the street, its tremendous weight shaking the houses and breaking plastering and walls; and in the noise and screeching of whistles, which, in the machinery employed, may make it the subject-matter of injury, which the horse-car, slowly driving along, would not occasion. It is not in the use of the street for cars, but in the mode of use. And, as an original proposition, I gravely doubt the right of any power to take a street, dedicated to public use for the citizens, and convert it into a railroad track, without the consent of the property holders thereon, where it comes as an obstacle

to a great thoroughfare, and the law provides (no) compensation. The right of eminent domain may be exercised over houses or streets, but the Legislature of Georgia, in the grant of charters, never contemplated arbitrary going through towns upon the part of railroads.

Nor can it be said that the citizen who buys property with knowledge, and by right, cannot complain of the use of the street upon which it lies for any public purpose, if, by such knowledge, he is to be held as understanding the power to make a railroad track of the street is contemplated. Such is not ordinary; and when it is done by the Legislature, I am of opinion he has the right of suit left; that he is not shorn of his right to complain and present his case to the Court and country.

But, on the trial, the most difficult question still remains to be disposed of—as to what elements of damage may be given in evidence.

From the view I entertain on the subject, I am satisfied that the rule ought to embrace the actual damage sustained from obstruction to the free ingress and egress, and access over and upon the streets. Inasmuch as the law has allowed the use of the streets by steam-cars, the passage over the street would not be, in itself, an obstruction, while reasonably exercised. And the laying of the iron upon the street, though it may create a jolt in crossing, would not be an element of damage; for it lies there by direction of the law. Nor would the apprehension of safety to children going out upon the street, nor the possibility of sickness in families, or any fanciful or speculative disturbance constitute an element. The damage which the law recognizes must be actual, something tangible and determinable; and to arrive at this the occupation of the parties by which losses in scholars, or in trade, or the like, have been occasioned, would not be legitimate; but the actual depreciation of the value of property would be proper, and this depreciation, not only from questions of access upon the street, but the noise, smoke, shaking

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of walls or plastering, and the like, which can be traced as effect to cause. In cases of this kind damages are not given for *feelings* of *parties*, or the fact that carriages might be injured by runaway horses, or that visitors are prevented from coming to the house, but must rest upon some solid, tangible injury; all consideration of sentimental injuries must be kept away in evidence and in argument from the jury.

We, therefore, affirm the judgment of the Court below, so far as he held jurisdiction in equity over the parties and subject-matter and enjoined the suit at law, reversing the condition required to be filed in writing, and give direction to the trial covering all the equities and rights of parties, and settling by one verdict and apportioning the damages found, if any, among the various roads, and the past and prospective claims of damage to be settled, and the roads have, from compliance with such verdict, future indemnity.

Judgment affirmed, except as to the condition therein stated; as to that, reversed.

WARNER, Judge, concurring.

The respective railroad companies, with the consent of the corporate authorities of the city of Augusta, and under the provisions of the Acts of the General Assembly, have the right to run their respective railroad trains by steam power over their track in Washington street, without being liable as trespassers for so doing, and without being liable to have their running trains over and along said street *abated* as a public nuisance, because they have the *license* of the General Assembly of the State and the city authorities to do so. But the injury and damage done to the owners of property on that street by the running of the trains of the respective railroad companies is another and distinct question. What are the legal rights of the owners of lands and tenements on Washington street? The owners of lands and tenements on Washington street are entitled to have and enjoy all the rights and privileges which legally appertain thereto, incor-

poreal as well as corporeal; for when the law doth give anything to one, it giveth *impliedly* whatsoever is *necessary* for enjoying the same. If the railroad companies, by permission of the public authorities, have located their road on the public street of the city, and by the use thereof, in running their trains, have *invaded any of the legal rights* of the owners of the lands and tenements on that street by hindering, obstructing or disturbing them in the regular use and lawful enjoyment of the same, then the owners of such lands and tenements are entitled to recover such damages as they have *actually* sustained by such invasion of their legal rights to the enjoyment of their property, although the railroad companies may not have located their road on any part of it. The invading, hindering, obstructing or disturbing them in the regular use and lawful enjoyment of their property is an interference with their private legal rights to that property, and, to that extent, is the taking of private property for the public use, for which just compensation should be made; not imaginary, speculative compensation, but compensation for the *actual damage* sustained by the *invasion* of their private legal rights to the use and enjoyment of their private property, resulting from the location and use of the railroad by the respective companies for the benefit of the public. If the General Assembly, in the exercise of its right of eminent domain, should pass an Act for the taking of private property for public use without providing any just compensation therefor, the Act would be unconstitutional, in violation of the fundamental principles of the law as the same has existed from *Magna Charta* to the present time. When no provision is made in the Act of the General Assembly for compensation, as in this case, the owner of the private property whose legal rights are invaded may pursue his legal remedy to obtain redress, he may stand upon *all his legal rights* as secured to him by the fundamental laws of the land. *Young vs. McKenzie, Harrison et al.*, 3 Kelly, 45; Code, 2962.

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It will not do to say that, because the City Council of Augusta granted *permission* to the railroad companies to locate their road on a public street in that city, which was ratified and confirmed by the General Assembly, that, therefore, it was not intended that the owners of private property on that street should receive compensation for the damage done to their private property by the use of that road in running trains thereon for the benefit of the public. Such gross injustice and violation of the fundamental law of the State cannot be imputed to the Legislature, the more especially as there is nothing in the Act from which any such intention can reasonably be inferred. Do these Acts of the City Council of Augusta and of the General Assembly, either separately or all combined together, deprive the owners of the lands and tenements on Washington street of their common law right to sue for and recover damages *actually sustained* for the invasion or disturbance of the use and enjoyment of their private property on that street for the benefit of the public?

In my judgment, they do not. A Court of equity, in this State, has jurisdiction to entertain a bill to avoid a multiplicity of suits in favor of or against several persons for the establishment of a right subject to legal controversy. The allegations in the complainant's bill make a proper case for the exercise of the equitable jurisdiction of the Court.

McCAY, Judge, dissenting.

It seems to me that there is some confusion in the line of argument pursued by the defendant in error in this case. Nobody will deny that private property cannot be taken by a railroad company, for its use, without compensation. That is not the question. If the plaintiffs in these cases own the land over which this road runs, they are very clearly entitled to compensation for its occupation, if they have never got it. But, whilst it may be admitted that, *prima facie*, the owners of the land on each side of a public highway are the owners

of the soil of the road, each to the centre, yet it would be absurd to say that this may not be shown, by proof, not to be true. The presumption is based upon the known history of the laying out of highways, to-wit: That, ordinarily, the public, by virtue of its right of eminent domain, takes possession of the land of citizens, and appropriates it, under the law, after due compensation, to public uses. But this is not always true. The public may own the whole land, as is usually the case in our country towns, and may sell lots, reserving the streets to its use. Surely it cannot be said that one whose land is described by meets and bounds, and acres and purchases, gets any more than is covered by his deed. And just that is the case, as to the city of Augusta, and as to Washington street. The land belonged to the State. The street was laid out by the public, the lots sold by meets and bounds, by acres and purchases, to those who desired to purchase.

It cannot, therefore, be said that there is, here, any taking of private property for public use. The *property* taken already belongs, and always has belonged, to the public. The real and only question here is, has the public the right to use a street, the property, the fee of which is, in itself, but which has been dedicated to the use of the citizens, as a street, for the purpose of running a railroad through it. In other words, did the public, by dedicating this land to public use, as a street, *contract* with anybody that it should not be used for the purposes it is now used? So far as the public in general are concerned, that public are represented by the public authorities, and they having consented to this use of it, are not complaining.

At last, therefore, the question is as to the rights of the lot owners. When they bought their lots on this street from the public, what right did they acquire *in the street*? In my judgment, they got a right to free egress and ingress, so far, and so far only, as was consistent with the legitimate use of the street by the public, for the purposes of a street.

Clearly, they did not get the right to a quiet *street*, to a street in which there should be no dust, nor rattling of vehicles, nor jostling of crowds. Every man buying and building on a street buys and builds with the understanding that the street may become a noisy, dusty, thronged and busy thoroughfare. The public, which owns the street and sells the land, very clearly, only contracts that the street shall be kept open for egress and ingress *as a street*, with the right, on the part of the public, to use it for any legitimate use to which a street may be subjected. The holders of the lots have this property right in the street, and that is all. It is a private right in each lot owner, and he has a private right of action for its infringement.

Is the use of steam to draw cars over this road a violation of this right? It is admitted that the right of egress and ingress is not interfered with. Indeed, it appears that the street may be crossed much more easily than before. Nor is there any more obstruction to passing up and down than there would be if the work now done by steam were done by waggons, probably nothing like so much. It seems absurd to me to say that a purchaser of a lot on a public street has his rights infringed by the passage of a steam car through the streets. I know of no single evil that comes to him that does not come every day in a greater or less degree to every man in the community since the introduction of steam. Is he interfered with by noise? Does not this shrieking passenger go screaming through every part of the land every night? Are horses frightened? Children put in danger? Sick-beds disturbed? Is not this true everywhere? It is intensified, it is true by close proximity, but that does not change the right.

These are all public evils, common to everybody. The public agrees to bear them, for the good which comes from the use of steam. As I have said, no man has a private right in quiet street, or a deserted and grassy street.

That foot-passengers or quiet carriages shall give way to

drays and heavy wagons and coarse, rough people; that it shall be paved and be turned from a quiet muddy street to a noisy dry one; that it shall be difficult to cross, or to go up and down on it, because it is passed over by so many people with so much traffic, all these are contingencies which every man takes who builds on a street. He has no right of action for any of them, not because they are *damnum absque injuria*, but because he has no right to be infringed. He has no contract, either express or implied, with anybody to the contrary. What kind of vehicles shall pass over the public streets, whether wheel-barrows, sedan-chairs, carriages, drays, cars or engines, it is for the public to say. If the right of egress and ingress is preserved to the owners of lots, the use of the street for passing is the right of the public.

As a matter of course, I recognize the right to sue for any injury to the property. If a good, sound wall is broken down, if plastering that would have stood the jar of drays over a stony street is shattered by these heavy trains, if actual damage comes to the property, that is another thing.

People, however, who build on a public street, must look-out that they do not put up such flimsy structures that they will be damaged by the use of the street by such vehicles as the public authorities may, in their wisdom, consent to be used for passing over it.

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of the State of Georgia,
AT ATLANTA,
JANUARY TERM, 1872.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY,
W. W. MONTGOMERY, } JUDGES.

NOTE.

JANUARY TERM, 1872, opened with but two Judges. LOCHRANE, Chief Justice, resigned on the 4th December, 1871, and WARNER was sworn in as Chief Justice on the 19th January, 1872. The vacancy created by WARNER's promotion had not been filled. He and McCAY presided for one week. At the hour for Court on Tuesday of the second week, WARNER, C. J., was sick. That was the 23d of January. McCAY, J., under section 3171 Revised Code, adjourned the Court from day to day till the 29th of January. Then he went to the room of WARNER, C. J., with the Clerk and Sheriff of the Court, and he and WARNER, C. J., adjourned the Court till the 6th of February, and on that day, at the same place, they again adjourned it till the 12th of February. On that day the Court again met, with the Clerk and Sheriff, MONTGOMERY, J., (who had been sworn in on the 8th February, 1872,) at the room of WARNER, C. J., and then the opinions in the cases argued the first week were delivered. McCAY, J., and MONTGOMERY, J., presided, without WARNER, C. J., at the Court-room, on the 18th of February and till the 12th of March, when WARNER, C. J., resumed his seat.

By section 204, Revised Code, "a decision concurred in by three Judges cannot be reversed or materially changed except by a full

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bench," etc. Those of the following cases not decided by a full bench are noted by the words, "By two Judges." All dated prior to and on the 12th of February were before WARNER, C. J., and McCAY, J., only. All dated after the 12th of February and up to the 12th of March, including that date, were before McCAY, J., and MONTGOMERY, J., only. Those without dates were before a full bench, unless otherwise stated.

REPORTER.

E. J. LEWIS, plaintiff in error, vs. A. M. HUDSON, defendant in error.

(BY TWO JUDGES.)—1. To render words actionable *per se*, it is not necessary that they should, in express words, charge another with a crime punishable by law; it is sufficient if they impute a crime, in such terms as that the hearers understand that this is what is meant.

2. When the words themselves are actionable, as imputing a crime, an *innuendo*, indicating in plainer language what crime was meant, is unnecessary and may be rejected as surplusage. 12th February, 1872.

Slander. Pleadings. Before Judge KNIGHT. Forsyth Superior Court. August Term, 1871.

Evelina J. Lewis averred that A. M. Hudson, wickedly intending to defame and injure her in her good name, fame and credit, heretofore, to-wit, on the fifteenth day of May, in the year of our Lord eighteen hundred and sixty-nine, in the county aforesaid, in a certain discourse which he then and there had of and concerning her, did, in the presence and hearing of divers persons, maliciously and falsely speak and publish of and concerning her the following false, scandalous and defamatory words—that is to say: "Mrs. Lewis would not suit me," (meaning that she, who is an unmarried female, would not suit him for a wife,) that "she was too thick with the Coroner," (meaning thereby that she was guilty of illicit criminal sexual intercourse with Henry C. Kellogg;) "she, some time back, was seen at the chicken coop of McAfee & Kellogg, with her clothes up, with a man," (meaning and intending thereby to charge her with the debasing crime of adultery and fornication with Henry C. Kellogg, a married

man, and expose her upon such false charge to the contempt of the upright and virtuous.) "A certain party (meaning her) employed me (meaning him, the said A. M. Hudson) *to buy her a magnetic conception preventive*, (meaning a certain magnetic agent or instrument said to be used by the debauched and infamous in their guilty amours) and I *wrote for it and sent the money*. I *received the magnetic agent or instrument*, and supplied the party, (meaning that he supplied her with said instrument or agent.) I (meaning said A. M. Hudson) *handed it to her*. She *knew more about it* than I (meaning himself) did. She called it by its current medical name—knew who manufactured it, and from whom I procured it. The reason why she knew so much about it was, in my opinion, because she had been using it, (meaning and intending thereby to charge that she was guilty of fornication, and had used the infamous means of concealing it and preventing pregnancy.) One night I was standing in the corner of her chimney. She, Bud and McHaffy, (meaning her, her youngest son, Major J. Lewis, and James McHaffy,) were sitting around the fire. Bud (meaning the son of your petitioner) got up and went out, and then she got up and went and sit down in McHaffy's lap and laid her arms around his neck and kissed him. I heard Bud's footsteps coming back, and she jumped up (meaning out of McHaffy's lap) and sat down in a chair. After talking a little while she retired to her room, and after awhile Bud and McHaffy went to bed, and after awhile I heard her say, Bud! Bud! Bud! three times. Bud made no answer; that was the signal for McHaffy to come to her room. I heard him (meaning the said James McHaffy) stumble or fall over a chair, (meaning and intending thereby to charge her with the guilt and crime of fornication with the said James McHaffy, a single man.) One night about nine o'clock I saw Colonel Kellogg come out of his parlor and go on down (meaning down the street) with Mrs. Lewis, or with her like she was going home. When they got opposite the offices (meaning the offices formerly

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occupied by W. A. Lewis and George N. Lester, on the public square) they (meaning the said Colonel Kellogg and her) stopped. I stopped to see her pass. I then heard footsteps going back towards Kellogg's. He (meaning Colonel Kellogg) went into the room between the parlor and the store, (meaning a certain room fronting on the public square in the house occupied by said Kellogg.) I thought that she was secreted between the offices. I searched for her particularly, but could not find her; believed that she had gone back with Colonel Kellogg and gone into the room with him," (meaning and intending thereby that your petitioner was guilty of the crime of adultery and fornication with the said Henry C. Kellogg.)

And your petitioner further sheweth, that the said A. M. Hudson has for months spoken and published of and concerning her, other base and infamous slanders and falsehoods, and has continued to utter, speak and publish them, wickedly, falsely and maliciously intending to defame and disgrace, degrade and wrong her.

By means of all which said grievances she has been damaged the sum of \$10,000 00. Wherefore, etc.

This declaration was demurred to and dismissed upon the ground that it contained no cause of action. That is assigned as error.

H. P. BELL; G. N. LESTER; J. R. BROWN; J. S. CLEMENTS, for plaintiff in error.

J. N. DORSEY; HENRY JACKSON & BROTHER, for defendant. Slander: R. Code, sec. 2926. Words not libellous are not made so by *innuendo*: 13 E. C. L. R., 128; 1 Burney's R., 537; 5th, 218; 4 Conn. R., 35; 5 John's R., 211, 188; 54 Maine R., 389; 4 Ga. R., 364. Words to be actionable *per se* must impute a crime: 21 Ga. R., 399; 26th, 423; 34th, 433. Criminality must certainly appear from the words: Starkie on S., 80. Greater precision required in modern times: *Ibid*, 79.

McCAY, Judge.

1. Whatever may be the rule at common law, or in the other States, in Georgia it is actionable, orally to impute to another a crime *punishable* by law: Revised Code, 2926. But our law goes further than this, and further, I think, than has been gone in any other State or country adopting the common law. In this State it is actionable to charge one with being guilty of *any debasing act* which may exclude him from society: Revised Code, sec. 2926.

We think the words set forth in this declaration are actionable. Perhaps this is not true of each particular sentence, but we think several of the sentences set forth are within the definition of the Code of oral slander. Indeed, we think this is true of all the sentences except the first, and had the declaration contained any *colloquium* authorizing the *innuendo* in reference to the word "corner," we think even that sentence actionable. A female guilty of the debasing act charged to have occurred at the chicken coop, would find but little countenance even among the low and vicious—since even among them there is still generally left some remains of at least the form of decency. If an act so debasing as this is not covered by the clause of the Code we have referred to, it would seem difficult to say what act is. The statements made in reference to what is said to have occurred when the defendant was couched in the corner of the chimney spying the actions of the plaintiff and her guest, if true, would go far to sustain an indictment for fornication. The same may be said of what defendant is charged to have uttered as the results of his other watch, upon the actions of the plaintiff as she was returning home from the house of a neighbor under his escort. And if any man of ordinary comprehension could hear the charge as to what is said to have taken place between the plaintiff and defendant in reference to the magnetic preventive, and not suppose there was an intent to charge her with fornication, we are much mistaken.

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It is not necessary, to slander, that there should be an express *charge* of crime. The words may impute the crime indirectly, by question. They may consist of a statement of facts, which, if true, lead the hearer to believe the crime has been committed: 2 Wend., 534; 2 Nev. & M., 551, 2 Hill, 510. Indeed, the statement of a set of pretended facts, producing, if believed, the conviction that one has been guilty of a particular crime, is, in truth, a more damaging accusation than a mere general charge of the crime. It is "a lie with the circumstance," and has a point and a pungency more galling than a simple lie. It is, too, more apt to be believed, since the detail and apparent caution of the narrator give an impress of truth to what is said. We doubt if there can be found a man or woman in Georgia, who, after hearing these words, would say he did not think it was the intent of the defendant to charge the plaintiff with fornication. And, as we think this is the natural necessary import of the words themselves, without any *innuendo* or *colloquium*, except the statement that the plaintiff is a woman, the fact that the charge is not made in terms, but by stating as facts, occurrences, which, if true, lead almost irresistibly to the conclusion that the plaintiff did commit fornication—only makes the matter worse, only gives the charge an air of greater truth, and only displays a greater malignity and more deliberate wickedness.

2. We think the *innuendo* surplusage. The words themselves, in all the sentences except the first, *impute* a crime. The general rule is, that if the words are themselves actionable, the *innuendo* may be rejected as surplusage: 15 Pick., 335; 6 Grattan, 534; 1 Denio, 360; 1 Cr. & M., 1; 2 Rich., 242; *Giles vs. The State*, 6 Ga., 276; 7 John., 264; 25 Wend., 621. We have looked into the case quoted in one of the cases read by counsel for defendant in error, to-wit: 3 Campbell's R., 460. In that case the words were not actionable *per se*. They needed an *innuendo*. And the plaintiff was held to the particular crime he had alleged, as intended to

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be imputed. In the case at bar, we think the words actionable *per se*, and the *innuendo* surplusage.

Judgment reversed.

JOHN W. BROWN *et al.*, plaintiffs in error, vs. ELI B. WELLS, tenant, defendant in error.

{BY TWO JUDGES.) A mere squatter on a lot of land, without color of title or claim of right, cannot defeat the title of the true owner by conveying the land to other purchasers, who have full knowledge of the nature and character of the title when they purchase it, although they may have been in possession of the land for seven years under such title. The law will not permit the true owner to be defrauded of his land in that way. 12th February, 1872.

New trial. Prescription. Before Judge PARROTT. Lumpkin Superior Court. September Term, 1871.

This was ejectment against Wells, tenant, in possession, begun on the 24th of April, 1861. Plaintiff read in evidence a regular chain of titles from the State to plaintiff's lessors, proved the *locus* and tenancy, and closed. Defendant introduced a quit-claim deed from George Williams to Nicholson, dated the 5th of May, 1851; one from Nicholson to William M. Williams, dated 28th November, 1851; one from Williams to Wade, dated the 19th of November, 1852; and one from Wade to Wells, dated the 1st of October, 1854. He then showed as follows: one Harper took possession of said land in 1840, when it was wild, and built upon it; about the same time George Williams built upon another part of said lot; they remained in possession till 1848 or 1849, when Harper gave up his claim to George Williams and moved away. Possession was held by George Williams and those holding under him, up to the bringing of this suit. On the other hand, it was shown that Wells, and each of said parties under whom he claimed, had notice that none of the

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others claimed any title to the premises, except what might arise from having possession.

The Court charged the jury that seven years' peaceable, continuous possession of land with claim of right will ripen into a good title by prescription against all persons except the State, or those laboring under disabilities to sue, and if defendant, or those under whom he claimed, held said land either seven years under color of title or by twenty years' actual adverse possession, the jury were authorized to find for defendant; and the possession of defendant and those under whom he held might be tacked together. If a party enter upon land of another with intent to hold, without buying it, it would be a fraud against a true owner, and a possession so originating would never ripen into a prescriptive title. The jury found for the plaintiff. Defendant moved for a new trial upon the grounds that the verdict was contrary to the law and charge of the Court, and because the last sentence of the charge is wrong. The Court granted a new trial. This is assigned as error.

H. P. BELL, for plaintiff in error. New trial: 15 Ga. R., 202; 20th, 732, secs. 2628, 2642.

WEIR BOYD, for defendant. Prescriptive title: R. Code, secs. 2636-7-8-9, 2640, 2647.

WARNER, Chief Justice.

This was an action of ejectment to recover the possession of a lot of land in Lumpkin county. The plaintiff showed a regular chain of title to the premises in dispute, from the State. The defendant claimed a title to the land under the Statute of Limitations, or a statutory right by prescription. The jury found a verdict for the plaintiff, and the Court below granted a new trial. Whereupon, the plaintiff excepted.

It appears from the evidence in the record that Williams went into the possession of the land as a mere squatter, without color of title. Williams sold the land to Nicholson, and

made him a quit-claim title. Nicholson and William W. Williams conveyed the land to Wade, and Frances Wade conveyed the land to Wells, the defendant, who lived about a mile from the land, and in the language of one of the witnesses, Wells of course knew all about the facts of Williams', Nicholson's and Wade's claim to the land. Wade knew that the land did not belong to him, but claimed it. Wells knew how the land was all the time. The point in the case is, whether the defendant, under the evidence, was a purchaser of a mere squatter's title, or whether he was a purchaser under a *bona fide* claim of right to the land. If he *knew* at the time of the purchase that he was only purchasing a mere *squatter's title*, he stands in no better condition than the original squatter as against the title of the true owner of the land. And we think there is sufficient evidence in the record to sustain the verdict of the jury on this point in the case, and that the Court below erred in setting the verdict aside and granting a new trial. A mere squatter on a lot of land, without color of title or claim of right, cannot defeat the title of the true owner by conveying the land to other purchasers who have full knowledge of the nature and character of the title when they purchase it, although they may have been in possession of it for seven years under such title. The law will not permit the true owner to be defrauded of his land in that way.

Let the judgment of the Court below be reversed.

S. B. PALMER, plaintiff in error, vs. JOHN PALMER, defendant in error.

(BY TWO JUDGES.) If what purports to be a copy of the record is not certified by the Clerk the cause will be dismissed. (R.)

If no part of the record is certified there can be no suggestion of a diminution of the record. (R.) 15th January, 1872.

Practice in Supreme Court. From Dawson county.

Saterfield et al. vs. Randall et al.

The bill of exceptions was properly certified. But what was sent up as a copy of the record had no certificate. Defendant's counsel moved to dismiss the cause because no certified record had been sent up. Plaintiff's counsel said he would suggest a diminution of the record. The Court replied that there was nothing certified upon which a suggestion of diminution could be made, and dismissed the cause.

WIER BOYD; H. P. BELL, for plaintiff in error.

GEORGE D. RICE, for defendant.

The cause of N. H. GOSS *vs.* J. W. BOND, from the same county, was dismissed for the same reason.

WIER BOYD, for plaintiff in error.

J. N. DORSEY, for defendant.

JOHN SATERFIELD *et al.*, plaintiffs in error, *vs.* JAMES RANDALL *et al.*, defendants in error.

(BY TWO JUDGES.)—When a defendant claimed a prescriptive right to a lot of land, under a bond for title, on the ground that he had possession of the same by the exercise of such acts of ownership as the owners of such property usually do, though not living on the lot, and the Court charged the jury that the use and occupation of the land by the defendant must have been continuous, “that is, *from day to day, month to month, and from year to year:*”

Held, That this charge of the Court was error, in view of the evidence contained in the record. 12th February, 1872.

Prescriptive title. Before Judge PARROTT. Lumpkin Superior Court. September Term, 1871.

This was ejectment, the defense being the Statute of Limitations. Title was shown from the State down to plaintiff. For the defense, it was shown that the premises in dispute

was a wild lot, not fit for cultivation, and that from time to time, defendant exercised ownership over it, by cutting wood and timber therefrom, and digging gold therefrom, claiming possession, though not living on the land, ever since he bought it in 1834, and took a bond for titles therefor from one claiming it as his, and paying him at least part of the promised price.

The Court charged the jury, among other things, that if the land was not fit for cultivation, but was chiefly valuable for timber and mining, they could consider whether the use and occupation which defendant had enjoyed, was equivalent to such actual possession as would be the foundation of a prescriptive title, either by seven years' possession under color of title, or by twenty years' possession without title. (But such use and occupation must be continuous, that is, from day to day, month to month, and from year to year.) The jury found for the plaintiff. Defendants' counsel moved for a new trial, upon the grounds that the verdict was contrary to the evidence and the charge of the Court, (not repeated here,) and because that part of said charge above, in brackets, was contrary to law. The Court refused a new trial. This is assigned as error.

WEIR BOYD, for plaintiffs in error.

H. P. BELL, for defendants.

WARNER, Chief Justice.

This was an action of ejectment, to recover the possession of a tract of land in Lumpkin county. On the trial of the case, the defendant claimed the land under a prescriptive right to the possession of the land for seven years, under a color of title and claim of right. Whether the defendants' possession, under the evidence, was sufficient to protect him under the law, was a question of fact for the jury, and if they had found a verdict for the defendants, we should

Hutchins, Jr., *et al.* vs. Baker *et al.*

not have been disposed to disturb it. But under the charge of the Court, the jury could not well have done otherwise than have found a verdict for the plaintiff. The Court charged the jury, "that if they believed, from the evidence, that the lot of land was not adapted to agricultural cultivation, but was chiefly valuable for timber and mining purposes, then they could consider whether the use and occupation which defendants had enjoyed was equivalent to such actual possession as would be the foundation of a prescriptive title, either for seven years under color of title, or twenty years without title, but such use and occupation must be *continuous*, that is, from *day to day*, *month to month*, and *from year to year*." This charge of the Court, in view of the evidence in the record, was error, and a new trial should have been granted.

Let the judgment of the Court below be reversed.

N. L. HUTCHINS, JR., *et al.*, plaintiffs in error, vs. S. H. BAKER *et al.*, defendants.

(BY TWO JUDGES.) If the bill of exceptions be not certified to be the true original, the cause will be dismissed. (R.) 16th January, 1872.

Practice in the Supreme Court. From Milton.

This cause was dismissed because there was no certificate that the bill of exceptions sent up with the certified record was the true original bill of exceptions.

G. N. LESTER ; T. M. PEEPLES, for plaintiffs in error.

H. P. BELL ; SIMMONS & HOWELL, for defendants.

H. G. COLE *et al.*, plaintiffs in error, *vs.* LEVI and J. C. LONG, defendants in possession.

(By two JUDGES.) When, on the trial of an action of ejectment to recover the possession of a lot of land, it became a material question whether a certain deed offered in evidence was a forgery, and the Court charged the jury, "But if you are satisfied, from the evidence, that the deed from Mrs. Meyers to Willis Jones is a forgery, then the deed is a nullity as to all parties having notice of such forgery:"

Held, that this charge of the Court was error. 12th February, 1872.

Ejectment. Notice. Before Judge KNIGHT. Gilmer Superior Court. October Term, 1871.

This was ejectment, brought in January, 1860, upon the several demises of the heirs of Mary Meyers, of Palmour, and of Henry G. Cole, against Levi and J. C. Long, tenants. The tenancy and *locus* were admitted. Plaintiff put in evidence a grant from the State to Mary Meyers, issued in 1843; a deed from certain persons, as her heirs, to Palmour, dated the 20th of February, 1835, and a deed from Palmour to Cole, dated the 22d of July, 1853. He showed that Mary Meyers was dead, and that Palmour's feoffors were her heirs-at-law, and closed.

The defendants relied upon a prescriptive title. They introduced deeds from Mary Meyers to W. Jones, dated the 5th of August, 1833; from Jones to Edward Thomas, dated the 20th of May, 1842; from Thomas to John T. Thweat, dated the 2d of August, 1854; from Thweat to John H. Powell and J. J. Inlow, dated the 26th of March, 1856; from Powell to Levi and J. C. Long, dated the 15th of August, 1857; from Newberry to Robt. Halloway, dated the 8th of June, 1853; from Halloway to said Inlow and Powell, dated the 9th of June, 1863; and from Inlow to Levi and J. C. Long, dated the 15th of August, 1857.

Defendants then showed that some twenty-five or thirty years ago one Champion occupied said land and improved it. Newberry followed him, and Halloway followed *him*, and

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Powers and Inlow *him* in the possession, and that the Longs had been in possession some ten or twelve years; but the witnesses said that they did not know that the tenants before the Longs claimed any title to the land. The Longs testified that they bought in good faith and took possession immediately upon their purchase, and had ever since held it as theirs.

In rebuttal, plaintiff showed that he first sued defendants for the land on the 11th of April, 1854, and dismissed his suit in June, 1854; sued again on the first of November, 1857, and dismissed in December, 1859. It was then shown that Champion claimed no title; sold his improvements to Newberry, who claimed no title, and that Holloway took possession from Newberry, who sold his rights to him.

Cole testified that Powell, Holloway and Newberry, each applied to him to purchase the land. He testified, also, that the deed from Mary Meyers to Jones was a forgery, and evidence was introduced to show that the person purporting to be a Justice of the Peace, witnessing said deed, was not a Justice of the Peace. (This deed was regularly attacked as a forged paper.)

The Court charged the jury: 1st. If the Longs, or those under whom they claimed, were in possession of the land, under paper title, when Cole bought, Cole's deed was void, if his deed was made prior to the adoption of our Code. 2d. A party in possession of land, disclaiming title, can take nothing by prescription. 3d. If the deed from Meyers to Jones is a forgery, it is a nullity as to all parties having notice of such forgery. 4th. Possession, as the basis of prescriptive title, must be in the right of the possessor, and must not originate in fraud. If Champion settled the lot without claim of right, his possession did originate in fraud. This possession must be public, continuous, exclusive, uninterrupted and peaceable, and must be accompanied by a claim of right. 5th. If a suit was pending for the land, while any of said parties alleged to have been in possession were in pos-

session, their possession was not peaceable while such suits were pending.

The jury found for the defendants. Plaintiff moved for a new trial, upon the grounds, that the verdict was contrary to the evidence and the law, especially to the 2d, 4th and 5th clauses of said charge, and because the 1st, 3d and 5th clauses of the charge were not law. The Court refused a new trial and error is assigned on said grounds.

H. P. BELL, for plaintiff in error. As to prescription: R. Code, secs. 2738, 2642; 30 Ga. R., 619. As to sale during adverse possession: R. Code, sec. 2654. As to the forged deed: R. Code, sec. 3739; 5 Ga. R., 6; 16th, 521; 30th, 619.

WEIR BOYD, for defendant. The deed to Jones was thirty years old, and proved itself: R. Code, sec. 2658. Sale during adverse possession: 29 Ga. R., 121, 320; 33d, 231; 37th, 5.

WARNER, Chief Justice.

This was an action of ejectment to recover the possession of a lot of land in Gilmer county. Both parties claimed to derive their title to the land from Mary Meyers, the drawer, the one by deed from Mary Meyers, and the other by a deed from the heirs-at-law of Mary Meyers. The deed of Mary Meyers, under which the defendants claimed title, was attacked, on the ground that it was a forgery, and evidence was introduced before the jury as to that fact. The defendant also relied on a prescriptive title of seven years' possession, under claim of right, under color of title. The jury found a verdict in favor of the defendants, but whether they found on the prescriptive title of possession, or whether they found that the defendants' title from Mary Meyers was not a forgery, under the charge of the Court, the record is silent. A motion was made for a new trial, on several grounds, and espe-

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cially on the ground that the Court erred in charging the jury in relation to the forged deed, which was overruled by the Court, and the plaintiff excepted. The Court charged the jury, "But if you are satisfied, from the evidence, that the deed from Mrs. Meyers to Willis Jones is a forgery, then the deed is a nullity, as to all parties having *notice* of such forgery." This charge of the Court to the jury was error. If the deed was a forgery, then it did not pass the title to the land out of Mary Meyers, and *notice* of the forgery was not necessary to make it a nullity. In view of the facts contained in the record of this case, and the error in the charge of the Court as to the forged deed, we think a new trial should have been granted.

Let the judgment of the Court below be reversed.

CHARLES DAVIS *et al.*, plaintiffs in error, vs. JAMES GURLEY,
defendant in error.

(BY TWO JUDGES.) To entitle the plaintiff to recover in an action against a defendant for the unlawful interference with his right of "common of pasturage," such right as against the defendant must first be established, and it must be shown that the defendant has *unlawfully* interfered with it. 12th February, 1872.

Pleading. Common. Trespass. Before Judge KNIGHT.
Union Superior Court. October Term, 1871.

Gurley averred that he owned \$2,000 00 worth of cattle and a prescriptive, legal right of way, common use, profit, possession and enjoyment for them for pasturage upon the wild productions of a large area of wild, unarable and uncultivated mountain lands, contiguous to his house and bordering on the Blue Ridge Mountains and Toccoa river, of the annual value of \$500 00, which, in common with his neighbors, he had enjoyed for such pasturage for thirty years last

past, yet said Davis *et al.*, by force and arms, willfully, fraudulently and maliciously dispossessed him and prevented such pasturage of his cattle, etc., by running a fence between Gurley's land and said wild lands for a distance of five miles, so as to shut out said cattle, etc., from said range, to his damage, etc. In another count he averred that said defendants had maliciously killed his certain cattle, to his damage, etc.

This declaration was demurred to because of a misjoinder of actions, and the first count was demurred to because it contained no cause of action. The demurrer was overruled.

The testimony showed that Davis *et al.* claimed certain land for which they said they paid \$12,000 00, and on it built a fence which prevented plaintiff's cattle from going to the range, which they had fed upon for many years, except by going a mile and a half further than before; the fence was five miles long, and was built, as Davis said, to keep Gurley's cattle apart from *his* cattle, and prevent trouble by his tenants hunting Gurley's stock. It was not pretended that Gurley had any right to said pasturage, except that, without interruption, his cattle, etc., had fed there for years. It was shown that some of Gurley's cattle were killed on Davis' land, inside said fence, and some few facts cast suspicion on defendants, but each of them swore that he did not kill said cattle or cause it to be done. The inconvenience to Gurley and his damage by killing his cattle was proved.

The Court charged the jury, that if defendants owned or had legal possession of said land, whereon the fence was, they had a right to fence off the said range; but that they should show legal title by deeds, or prescription for twenty years, with claim of right in themselves or in the true owners, and that they were the agents of the owners. And if they failed to show such title, plaintiff could recover for fencing out his cattle. In order to bar or end a right of common by enclosing, the land must be enclosed, a fence built through the country but not enclosing the land will not bar or

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end the right of common. He was requested to charge, "common, because of vicinage, is a mutual right in the inhabitants of a neighborhood of suffering their cattle to stray into other's fields without molestation, until either of them shall enclose the land and bar out the others; when it is so enclosed, the right of common ceases, ends, becomes extinguished." He so charged, adding "provided the persons enclosing it have the true, legal title to the land." The jury found for the plaintiff for \$125 00 and costs. Defendant's counsel moved for a new trial, upon the grounds that the Court erred in overruling said demurrer, in charging as he did, and qualifying said request to charge as he did, and because the verdict was contrary to the law and evidence. The Court refused a new trial, and error is assigned on said grounds.

C. J. WELBORN; J. S. FAIN; H. P. BELL, by G. N. LESTER, for plaintiff in error.

WEIR BOYD, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants, containing two counts, one for interfering with his right of common of pasturage, on lands granted by the State in the county of Union, and the other to recover damages for killing his stock. There was a demurrer to the declaration which the Court overruled, and, in our judgment, properly overruled. On the trial of the case, after hearing the evidence and charge of the Court, the jury returned a verdict for the plaintiff for \$125 00. A motion was made for a new trial, which was overruled by the Court, and the defendants excepted. There is no evidence in the record that the defendants killed the plaintiff's stock, which would, under the law, authorize the jury to find a verdict against them. That the *unlawful* interference with one's right of common

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of pasturage is actionable when the right exists, is undoubtedly true, but the difficulty with the plaintiff in this case is, that the evidence in the record does not establish such right of common of pasturage against the defendants; or, if it does, that the defendants have *unlawfully* interfered with it.

Let the judgment of the Court below be reversed.

WILLIAM AKRIDGE *et al.*, plaintiffs in error, vs. L. A. PATILLO, defendant in error.

(BY TWO JUDGES.)—1. Where a controversy is submitted to arbitration, under the Code, and the arbitrators and parties have several meetings, at the first of which only two of the arbitrators are present, and no objection is made by either party at the time to the absence of third arbitrator, it is too late, on motion to make the award the judgment of the Court, to object to such motion on the ground of the absence of the third arbitrator from the first meeting, especially where the arbitrators were unanimous.

2. Where numerous objections are filed to an award, on the ground that the award was the result of accident, or mistake, or fraud of some one or all of the arbitrators or parties, or is otherwise illegal, all of which objections are, in effect, objections because the award is contrary to evidence, or the weight of evidence, the testimony submitted to the arbitrators should be before this Court to enable it to pass intelligently upon the objections made. Nor will the fact that the objections were demurred to for insufficiency dispense with this. 20th February, 1872.

Waiver. Arbitration and Award. Before Judge DAVIS.
Walton Superior Court. August Term, 1871.

For the facts see the opinion.

CLARK & PACE, by E. P. HOWELL, for plaintiffs in error.

WALKER & MCDANIEL; J. A. BILLUPS, for defendant.

MONTGOMERY, Judge.

The parties in this case having been partners, got into a controversy as to the settlement of their accounts, and submitted their differences to arbitration, under the Code. At

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the first meeting of the arbitrators, all parties were present except the umpire. The parties, nevertheless, proceeded with their case before the two arbitrators present, without objection. There were several meetings, at all but the first of which all of the arbitrators were present. An unanimous award was rendered against the plaintiffs in error for about \$2,000 00, and when it was attempted to make the award the judgment of the Court, they filed some eighteen objections, to which the opposite party demurred. The Court sustained the demurrer as to all but two of the objections, and these were passed upon by a jury, who sustained the award, except as to one item, not material to the consideration of the case as presented before us. To the judgment of the Court sustaining the demurrer, counsel for plaintiffs in error except. The first objection to the award is the absence of the umpire at the first meeting. All the other objections, now before us, are, in effect, objections to the finding of the arbitrators, as against the evidence adduced to them. None of that evidence is before the Court; no brief of it accompanying the record, in any shape.

As to the first objection, we think it comes too late after the party has taken all the chances of an award in his favor, and makes no objection until the award is found to be against him, he having consented to go on before the two arbitrators, at their first meeting. Nor can we consider, intelligently, the other objections, in the absence of the evidence upon which the arbitrators founded their award.

“It is going very far, under the authorities, to permit any attack upon an award, on the ground that it is contrary to the evidence, but whilst we, nevertheless, have gone thus far, we think the case must be a very strong one—one that shuts the Court up to the inference of fraud and gross mistake,” to justify the setting aside of an award on this ground: *Tomlinson vs. Hardwick*, 41 Ga. R., 547.

“It is not sufficient to state, generally, that the award was against the weight of evidence, or without evidence, unless

the evidence submitted to the arbitrators is set forth and specified:" *Sharpe & Brown vs. Loyless*, 39 Ga. R., 7. And can we infer that the arbitrators have been guilty of fraud or gross mistake in finding contrary to the evidence, without that evidence before us?

Nor does the fact that a demurrer has been filed dispense with the evidence. "If there be any evidence to sustain the award, the exceptions will be demurrable:" 41 Ga. R., 547. In the absence of all the evidence, we cannot presume the arbitrators had none to sustain their award.

We sustain the ruling of the Court below in the judgment pronounced from the bench. See head notes.

E. P. WILLIAMS, administrator, plaintiff in error, vs. ANN E. LOWRY, defendant in error.

(By two judges.) If the bill of exceptions be not certified to be the original by the Clerk, the writ of error will be dismissed, even though an answer of the Judge, with respect to the bill of exceptions, shows that it is the original. (R.) 18th February, 1872.

Practice in Supreme Court. From Habersham.

Williams, administrator, filed a bill for direction, etc., against Ann E. Lowry *et al.* At April Term, 1871, it was dismissed on demurrer. A bill of exceptions was handed to the Judge, but he kept it till about the 20th of June, 1871. It reached counsel by mail on the 24th of June. The Judge's certificate was dated on the 10th of May, and contained no reason for his delay on returning it to counsel. By reason of this detention it was impossible to serve the opposite counsel within ten days from the date of the certificate, and therefore counsel did not send the cause up. Upon these facts being shown to this Court, Judge Davis was required to certify the cause of such delay within thirty days from

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that date—3d July, 1871. He certified, and the cause was then sent up for this term.

Judge Davis added to the bill of exceptions a copy of said order and his certificate that said delay was from providential cause, and thus the paper was served and came here. It had been filed in the Court below, but it had on it no certificate from the Clerk that it was the true original. When called here, counsel moved to dismiss it for want of said Clerk's certificate. It was replied, that Judge Davis' last certificate supplied the want of the Clerk's certificate. But the Court dismissed the cause.

HUTCHINS & McMILLAN, by Z. D. HARRISON, for plaintiff in error.

C. H. SUTTON; HENRY JACKSON & BROTHER, for defendant.

ROBERT M. SMITH, plaintiff in error, vs. M. B. BRAND, defendant in error.

(By two JUDGES.) When on a bill filed for an account and settlement of the affairs of a partnership, there was an answer, and the parties at issue, on the bill and answers, and there was a verdict for the plaintiff, and a motion for a new trial, on the ground that the Court erred in refusing to continue the cause, and it appearing, on the hearing of the motion, by the sworn statements of the absent counsel, that one of them was prevented from attending Court by providential cause, and the other, because the Judge had informed him, in open Court, at the regular term at the time he had fixed the day for the Adjourned Term at which the case was tried, that he had given Mr. Walker leave of absence from the Adjourned Term, and that none of his cases would be tried; that Mr. Walker was a leading counsel for the plaintiff in this case, and was counsel in all the cases in which the absent counsel was employed; that he had so publicly notified the Court, and that trusting to this he had not attended the said Adjourned Term:

Held, That it was no abuse of the discretion vested in the Judge, in such cases, to grant a new trial. 20th February, 1872.

New Trial. Continuance. Absence of Counsel. Before Judge DAVIS. Walton Superior Court. August Term, 1871.

Smith filed a bill for discovery and for an account and settlement of a partnership between himself and Brand, averring that Brand was in his debt. Brand, by his counsel, John J. Floyd, answered, admitting the partnership, etc., but denied that he owed Smith anything. At an adjourned term, Brand moved to continue for the absence of his leading counsel, Floyd and Billups, but why they were away did not appear. It was tried in the absence of Floyd and Billups, and resulted in a verdict for Smith. A motion for a new trial was made upon the grounds that the Court erred in refusing the continuance, and in his charge, and that the verdict was contrary to the evidence, etc. When this motion came on to be heard, John J. Floyd and J. A. Billups, counsel for Brand, proposed to state, in their places, "as preliminary to said hearing," why they were not present at said trial. This was objected to because it would be adding to the completed brief of evidence, and that it was immaterial why they were absent, inasmuch as these reasons were not made known when the motion for continuance was made.

It appeared that at August Term, 1870, the Court announced that he would hold an Adjourned Term on the third Monday in November. Floyd said he could not be present. The Court replied that Colonel Walker (Smith's counsel) had leave of absence from said Adjourned Term, and then Floyd urged no further objection. The Court made a second adjournment till the second Monday in December. By this time Walker's leave had expired, and he was present.

Floyd stated that he filed the answer, and was leading counsel. But as he did not attend the Court always till its ending, Billups was also employed to assist him, if present, or to manage and control the case if Floyd were gone. He had returned home fatigued the Saturday before Court, was told by Colonel Clark that this second Adjourned Term

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would be held, and he told Clark that he was not going. (Whether he knew Walker was to be present does not appear.) Billups showed that sudden sickness in his family prevented his going to the Court or sending any excuse. The Court granted a new trial. That is assigned as error.

WALKER & McDANIEL; W. W. CLARK; HILLYER & BROTHER, for plaintiff in error. As to new trial: 37 Ga. R., 318; 5 Wend. R., 127. Billups was not leading counsel 10 Ga. R., 85; 16th, 526; 24th, 476; 31st, 46.

J. W. ARNOLD; GLENN & DUNLAP; J. J. FLOYD, for defendant.

McCAY, Judge.

It is very clear to us that the defendant below was seriously damaged by the absence of his counsel, and it is equally clear that the absence of the counsel was for very good reasons. Judge Floyd was misled by the Judge himself, and Mr. Billups was absent from providential cause.

We think the discretion of the Judge was not improperly exercised in granting this new trial. The principles of justice required it. Courts ought not to permit themselves to be made the instruments of injustice; and though it be true that if parties get into trouble from want of diligence, they can claim no indulgence, yet, when, as was the case here, the counsel are not at fault, we think the client ought not to suffer. The Judge who tried the case, having granted a new trial on this ground, and he being so situated as to know the truth better far than we can, we will not disturb his judgment.

Judgment affirmed.

BENJAMIN O. KELLY, administrator, plaintiff in error, vs.
LESLIE G. CARTER, defendant in error.

(BY TWO JUDGES.) 1. An affidavit by an administrator, in a suit pending in his favor, on a debt contracted with his intestate before the first of June, 1865, that "according to the best of his knowledge and belief and information, all legal taxes have been paid on the same for each year since the same came into his possession as administrator, except for the years 1869 and 1870, deponent being advised that the note was so doubtful of collection that he was not required to pay taxes on the same for the years 1869 and 1870, being then considered doubtful if not uncollectable," is a substantial compliance with the 1st section of the Act of October 18th, 1870.

2. The fact that a widow and minors are interested as distributees, with other heirs and creditors of an estate, does not bring a suit on a note due an intestate and in suit by an administrator, within the 14th section of the Act of October 18th 1870, so as to excuse the filing an affidavit and proof at the trial that all legal taxes due on the debt have been paid. 20th February, 1872.

Relief Act of 1870. Widows and Minors. Before Judge DAVIS. Walton Superior Court. August Term, 1871.

Kelly, as administrator of Tucker, sued Carter upon his promissory note, payable to Tucker, made in 1862. Kelly filed his affidavit that, "to the best of his knowledge and information, all legal taxes upon said debt have been duly paid, or the income thereon, for each year since the same came into his hands as administrator, except for the years 1869 and 1870. Deponent was advised that the note was so doubtful of collection that he was not required by law to pay taxes on the same for the years 1869 and 1870, it being then considered as very doubtful if not uncollectable. That portion of the statute which requires him to swear that his intestate paid all legal taxes, requires an impossibility, and is, therefore, not binding. He is informed and believes that there are widows, or a widow and minor children, who are distributees of said Tucker, and is advised that the provisions of the first and second sections of said Act do not apply to this claim. And deponent expects to prove these facts upon the trial."

Kelly vs. Carter.

Defendant's counsel moved to dismiss the cause because such affidavit was insufficient under the Relief Act of 1870. Plaintiff's counsel resisted the motion, and said if he was wrong, this cause was within the exception contained in the fourteenth section of the Act, because Mrs. Freeman, a daughter of Tucker, was an heir at law of Tucker, with a widow having a minor child, who was interested in this suit. The Court dismissed the cause. That is assigned as error.

WALKER & McDANIEL, for plaintiff in error. Affidavit was sufficient: *Akin vs. McDaniel*, October, 1871; *Worrell vs. Adams*, August, 1871. Widow was interested: R. Code, secs. 295, 3504, 2447.

J. M. ARNOLD, by HILLYER & BROTHER, for defendant.

McCAY, Judge.

1. The affidavit is a substantial compliance with the Act of October 13th, 1870. The statute does not require the oath to be positive, and the affidavit is only preparatory to making proof on the trial. The plaintiff swears that according to the best of his knowledge, the taxes have been paid, except for two years, when he says that it was of such doubtful solvency as not to be taxable. This amounts to saying it was of no value, and is sufficient, in our judgment, to let the case go to the jury. If that is proven, that for those years the debt was worthless, had no value, it was not taxable. The affidavit must necessarily turn on the plaintiff's opinion. The proof on the trial will show whether that opinion was right.

2. It would be straining section fourteen of the Act very much, to say that the facts of this case bring it within that section. These minors are not the *owners* of this note or any part of it. They have an interest in the *residue*, after the payment of debts and expenses, but even that is divided with others. Were there no debts and no other heirs, so

that the administrator might fairly be said to be a trustee for them, we incline to think the fourteenth section would apply. As it is, they are not even the equitable owners. They are merely distributees of an estate, of which this note forms a part of the assets. They may get nothing.

But we reverse the judgment on the first ground.

D. GOODE & SON, plaintiffs in error, vs. N. RAWLINS, sheriff,
defendant in error.

(BY TWO JUDGES.)—1. Where a sheriff is ruled by a plaintiff in *fi. fa.*, and answers, to which answer a traverse is filed, and plaintiff, at a subsequent term, proposes to withdraw his traverse and substitute another, it is impossible for this Court to say that the Court below abused its discretion in allowing the sheriff a continuance, on the ground of such substitution, unless we had the new traverse before us.

2. It is not necessary, under Revised Code, section 8898, that the consent of the mortgagor, mortgagee and plaintiff in *fi. fa.*, levied, to sell the entire fee in the land levied on, should be in writing.

3. It follows, that where one, purporting to be the agent of the mortgagor, gives such consent, it is not necessary that the agency should be created in writing.

4. A ratification of the act of such agent by the mortgagor, supposing the agent had no authority at the time of sale, is valid under Revised Code, section 2165.

5. It is not necessary for the Court to apply the law given in charge to the jury, to the facts of the case, when application is plainly apparent.

6. Counsel should request the Court to charge upon the material points in the cause. (R.)

7. If a sheriff undertakes to sell the fee in land, when in fact he is selling only the equity of redemption, the bidder cannot be compelled to pay the amount bid by him. (R.) 20th February, 1872.

Practice. Mortgage sales. Principal and Agent. Charge of the Court. Mistake at sheriff's sale. Before Judge ALEXANDER. Pulaski Superior Court. April Term, 1871.

This case is reported in the opinion.

H. C. DUNCAN ; W. L. GRICE, for plaintiffs in error.

Goode & Son vs. Rawlins.

HANSELL & HANSELL; PATE & RYAN, by CLARK & SPENCER, for defendant.

MONTGOMERY, Judge.

This was a rule against the sheriff to pay money over to the plaintiffs, under the following circumstances: D. Goode & Son were judgment creditors of one Merritt. The sheriff, at the instance of other judgment creditors, had levied on defendant's one half interest in a warehouse, on which one Bozeman held a mortgage for some \$4,000 00. On the day of sale, the plaintiffs in *fi. fa.* levied the mortgages, and Anderson, the son-in-law of the mortgagor, representing his father-in-law, who was in Montana, agreed that the entire fee in the premises might be sold, the mortgagee consenting to look to the proceeds of the sales to reimburse himself. The *fi. fa.* of Goode & Son had not been levied. The announcement was publicly made, at the sale, of the agreement to sell the entire fee, and the property brought some \$3,500 00. Anderson had no written authority from his father-in-law to consent to the sale of the entire fee, but was his general agent, to attend to his business in Georgia. After the sale, he wrote to Merritt, informing him of what had been done, and Merritt, by letter, ratified his action. Goode & Son gave notice to the sheriff, after the sale, that they would claim the money on their *fi. fa.*, notwithstanding which the sheriff paid the money over to the mortgagee. Goode & Son then ruled the sheriff, who answered, setting forth the facts as above stated. The answer was traversed, among other reasons, because the agreement to sell the entire fee was a contract concerning lands, and was not in writing, and hence, there was no agreement on the part of Merritt to sell the entire fee. This traverse was filed at a term preceding the trial, and at the trial, Goode & Son moved to withdraw their traverse and substitute a new one. Counsel for Rawlins said the new traverse was a surprise to him, and he should claim a continuance if it was filed.

The Court ruled that Goode & Son might file their new traverse, but under the statement of counsel for Rawlins, he would grant a continuance. With this condition attached to the permission to file the new traverse, counsel for Goode & Son declined to file it, and proceeded to trial on the old traverse.

The jury found in favor of the sheriff. Goode & Son, without making a motion for a new trial, excepted, and assigned the following errors :

1st. In not allowing them to substitute a new for the old traverse, without permitting a continuance, if the opposite counsel claimed to be surprised.

2d. In charging the jury that, if R. W. Anderson was the agent of Merritt, it was not necessary that his appointment should be in writing.

3d. In charging the jury that, if Anderson was Merritt's agent, and consented to the sale, as made, such consent was valid, although it was not given in writing.

4th. In charging that, if Anderson, professing to act as agent for Merritt, consented to the sale, such consent became valid, if subsequently ratified by Merritt.

5th. In charging that the consent of the mortgagor, mortgagee and plaintiffs in *fi. fa.* levied, was sufficient, although such consent was not in writing.

6th. In reading sections 2152 and 2166 of the Code, without making any application of the law to the facts of the case.

There was one other assignment of error, which the Judge refused to certify. The proposed new traverse does not appear in the record.

1. This new traverse not being in the record, it is impossible for us to say that the Judge below abused his discretion in putting the party who proposed to amend upon terms.

2. It is argued that the agreement between the mortgagor, mortgagee and plaintiffs in *fi. fa.* levied under section 3898 of the Code, is a contract for the sale of lands, or an inter-

est in them, and that, therefore, under section 1940 of the Code, it must necessarily be in writing to make it valid. We do not think that it is a contract for the sale of lands, or any interest in them. It is an agreement by the parties interested that the land in which they are jointly interested may be sold, not a contract for its sale, made with one who contemplates purchasing, which is the class of cases, of this kind, to which the Statute of Frauds was intended to apply.

3. It necessarily follows that an agency, created by one of the parties in interest to give his assent to such an agreement, need not be in writing.

4. And a ratification of the act of one who volunteers to act as agent in such an agreement, is valid under Revised Code, section 2166.

We see no error in the Court's reading, without making the application, sections 2152 and 2156 of the Code, to the jury.

5. The jury must be presumed to have some degree of intelligence, and if they had any, the application of the sections read to the case under their consideration, was too plainly apparent to need explanation from the Court.

6. Counsel for plaintiff in error, in his brief, dwells much upon the invalidity of Bozeman's mortgage, and says, "one traverse distinctly denies the validity of Bozeman's mortgage, as well as the mortgage debt, and the sheriff offers no proof in support of them." Suppose it was his duty to do so and he failed? There appears to have been no request for the Court to charge this as law to the jury, and none of the assignments of error cover this point. And this remark is applicable to many of the points made in the argument of counsel. This Court can only consider such points as have been passed upon by the Court below, and are made by the record.

7. Finally, what good purpose of the plaintiffs in error would be served by holding in this proceeding that only the equity of redemption in the land had been sold? It is very certain that the purchaser at the sale has the right to the entire fee, or a rescission of the sale. It will hardly be ques-

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tioned that he could enjoin the sheriff from paying over the money, if the latter were to offer him only a title to the equity of redemption. That the mortgagee was the purchaser does not alter the case.

We, therefore, affirm the judgment of the Superior Court.

R. G. FULGAM, plaintiff in error, *vs.* **THE MACON AND BRUNSWICK RAILROAD COMPANY**, defendant in error.

(BY TWO JUDGES.)—Where there was a subscription of stock to a railroad company, and when due the payment of the amount subscribed was demanded by the company, and payment was refused:

Held, That it was not necessary for the company to show that it had issued or offered to issue the certificates of stock as a condition precedent to a right of recovery on the subscription. 20th February, 1872.

Corporations. Condition precedent. Before Judge **ALEXANDER**. Pulaski Superior Court. April Term, 1871.

On the 13th of March, 1866, Fulgam and others signed the following paper, at Hawkinsville, Georgia:

“We, the undersigned, agree to pay to the Macon and Brunswick Railroad Company the amount set opposite our names, respectively; for the true payment of which we bind ourselves, upon the demand of said railroad company, or their agent. The condition of this subscription is such that said subscribers are to receive stock in said railroad, amount subscribed by each, of the stock heretofore subscribed and unpaid, which had been guaranteed by the citizens of Hawkinsville, by obligation to said railroad company;” opposite Fulgam’s signature was “1 share, \$100 00.”

The company sued Fulgam on said paper for \$100 00, averring that it had demanded the money, and he refused to pay, though it then tendered him an obligation of the company, entitling him to said stock. The defense was that the delivery of the stock-certificate was a condition precedent to the demand.

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The only evidence was said paper, proof of demand, and that at the date of demand, the agent exhibited to Fulgam a paper, declaring that he was entitled to "one share of the capital stock of said company." The Court charged the jury that, upon introducing the contract and proving demand and refusal to pay, plaintiff could recover. The jury found for plaintiff. Said charge is assigned as error.

HANSELL & HANSELL, by CLARK & SPENCER, for plaintiff in error.

S. HALL; CHARLES C. KIBBEE, by Reporter, for defendant. Amount *subscribed* makes *capital stock*: 8 Ga. R., 486. May be sued for: *Ibid.* Court construes contract: R. Code, sec. 2712; 36 Ga. R., 459. Mutual contracts enforced by either: Comyn on C., 40, 41, 7, 9, 11; 1 Sanders, 201. This case covered by 5 Ga. R., 171. See 39 Ga. R., 548.

McCAY, Judge.

We think the plaintiff in error was, as was charged by the Judge, liable to suit on his *refusal* to pay. He had subscribed the stock, and he was not entitled to a certificate of stock until his subscription was paid. It was argued that a subscription for stock stands on the same footing as a contract of purchase; that the company, like the vendor, must offer to deliver before he can demand the price. Is this so? We think not. Whenever the subscriber pays, he is the owner of stock in the company. It is the payment that makes him the stockholder. The certificate of stock is only the evidence of his right. He would be a full stockholder, with all the rights of one, if the certificate was not issued at all. The case is wholly different from the instance of a sale of stock; that may, and perhaps does, stand in the same footing of other sales.

Whether the company was competent to issue the sort of stock claimed by the defendant, was for him to show. It was

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matter of defense. We cannot tell from the paper whether this was to be a peculiar kind of stock, with a special guarantee, or not.

Under the proof, as it was made, we think the Court and jury both right. There is nothing in the paper to show that the stock was to have any particular rank, and if there was, it does not appear that, on the payment of the money, the subscriber would not have had just such rights, as a stockholder, as he contracted for.

Judgment affirmed.

J. N. NEWTON, plaintiff in error, vs. JESSE BURTZ, defendant in error.

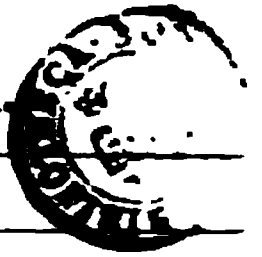
(BY TWO JUDGES.) "It must *affirmatively* appear, either by the certificate of the presiding Judge or the transcript of the record sent up by the Clerk, that the bill of exceptions was signed and certified within thirty days after the close of the term in which the cause was heard," or the writ of error will be dismissed. (R.) 20th February, 1872.

Complaint from Mitchell County.

The bill of exceptions recited that the cause was tried in May, 1871, and that the Judge committed certain errors. The Judge signed it on the 21st of July, 1871, saying he had retained it for ten days. It nowhere appeared when the Court adjourned. Upon motion of defendant's counsel, the writ of error was dismissed, because it did not appear that the bill of exceptions was signed and certified within thirty days from the close of said Court.

J. J. BRADFORD, by CLARK & GOSS, for plaintiff in error.

C. O. DAVIS; L. E. BLECKLY, by the Reporter, for defendant, cited: 6 Ga. R., 481, 491, 578.



Tift vs. Newsom.

N. & A. F. TIFT, plaintiffs in error, vs. ELIZABETH NEWSOM, defendant in error.

(By two judges.) Where a factor makes advances to a planter, and takes a lien upon the growing crops, under Revised Code, section 1977, such advances are in the nature of purchase-money, and the lien is, therefore, superior to the wife's title, where the crop was set apart to her as personalty under the homestead laws, after it was made. 20th February, 1872.

Factor's lien. Homestead exemption. Before Judge STROZIER. Dougherty Superior Court. June Term, 1871.

N. & A. F. Tift, factors, made advances to Newsom "for the purpose of sustaining the plantation," of Newsom, "and his family, and in payment of the labor and other current expenses of said plantation," and he gave them a written factor's lien upon the growing crop, etc. They foreclosed this lien and had the *fi. fa.* levied upon part of said crop. Mrs. Newsom claimed the property levied upon, and to sustain her claim showed that the same had been set apart to her under the homestead and exemption laws after said lien was made. The Court charged that the property was not subject to the factor's lien, and so the jury found. Said charge is assigned as error.

D. H. POPE; HINES & HOBBS, by CLARK & GOSS, for plaintiffs in error.

No appearance for defendant.

MONTGOMERY, Judge.

The record in this case presents but one question, to-wit: Is a factor's lien, under Revised Code, section 1977, upon the growing crops of a planter superior in dignity to the personalty exemption of the wife, under the homestead laws, claimed by her and granted by the Ordinary, in the crop after it is gathered? We think it is. A homestead of realty is certain-

ly liable for "money borrowed and expended in the improvement of the homestead," and "for labor done thereon," and "material furnished therefor," and "for the purchase-money of the same." Upon what better foundation does the exemption of personalty rest? None is perceived. If none exists, it follows, that it must be liable for "material furnished therefor." And, certainly, provisions furnished to make the crop may well be considered as of this last mentioned class. The money expended in the purchase of such provisions not only vests the title to the crop in the planter, but actually creates the crop. It may at least be said to be in the nature of purchase-money.

The affidavit of plaintiff in *fi. fa.*, made for the purpose of foreclosure, states the debt to be for advances made and provisions furnished to enable the defendant in *fi. fa.* to make his crop. There is no question raised as to whether advances made in any other shape than as provisions or commercial manures furnished, can be secured by a lien capable of foreclosure, under section 1969 of the Code; and upon this point we express no opinion.

Let the judgment of the Court below be reversed.

WILLIAM KEEN, plaintiff in error, vs. J. W. ROUSE, Ordinary, defendant in error.

(BY TWO JUDGES.) A sheriff is not entitled to costs on tax *fi. fas.*, whether for State or county taxes, unless the same be collected from the defendants. Nor does the fact that the *fi. fas.* issued illegally under order of the Inferior Court, alter the rules. 20th February, 1872.

Tax. Costs. Sheriffs. Before Judge STROZIER. Worth Superior Court. May Term, 1871.

Keen, as sheriff, claimed that Worth county owed him costs for levying certain county tax *fi. fas.* and advertising

Keen vs. Rouse.

sales thereunder. He admitted that the property was not sold because the *fi. fas.* were illegally issued, and yet he asked that the Ordinary be compelled to direct the treasurer to pay his costs. Court refused to grant the *mandamus*. This refusal is assigned as error.

D. H. POPE, by J. D. POPE, for plaintiff in error.

HARRIS & SMITH, for defendant.

MONTGOMERY, Judge.

This was an application for a *mandamus* to compel the Ordinary to give the plaintiff an order on the county treasurer for fees which he claimed was due him, as sheriff, for levying certain *fi. fas.* on land in the county of Worth, which *fi. fas.* were issued by order of the Inferior Court, before that Court was abolished. The plaintiff also sought to embrace in the order about \$60 00, expended by him in advertising the lands for sale. The sale was stopped and the levies ordered to be dismissed by the Comptroller General, as the order of the Inferior Court was illegal. It is conceded that the order was illegal, but contended that, nevertheless, the sheriff is entitled to his fees, as he is only a ministerial officer and must obey the mandates of the Courts. It is true, that he must obey the Courts, but we do not think it follows that he is, in the present case, entitled to his fees. A sheriff is sometimes required to do an act for which no compensation is provided; as, for instance, to attend upon all elections. He who takes the office, takes it with the obligation resting on it, to perform all its duties, as well as those for which fees are provided, as those having no pecuniary emolument attached to them. Section 890 of the Code, provides that no sheriff shall receive costs on any tax *fi. fa.*, unless the same be collected from the defendant. The necessary inference is, if he fails to collect them from the defendant, the service must go unawarded.

Judgment affirmed.

ELIZA FAIRCLOTH, plaintiff in error, vs. WILLIAM ST. JOHNS, defendant in error.

(By two judges.) 1. Where A bargained land to B, taking his notes for the purchase-money, giving his bond for titles, and afterwards indorsed one of the notes to C, who indorsed it to D, and B having paid some of the purchase-money, abandoned the land, and A having died, his administrator took possession of the land:

Held, That the indorser and minor children of A are entitled to a homestead in the land as against a judgment obtained by D on the indorsed note against B as principal, and A and C as indorsers. The equity of B, under his bond for titles, with some of the purchase-money paid, to pay the purchase-money and demand a title, does not, in such a case, make the lien of the judgment paramount to the homestead.

2. If, at the time of the sale of land by the sheriff, an application be pending for a homestead in favor of the family of the defendant, and notice thereof be given at the sale, the purchaser buys subject to the homestead. 20th February, 1872.

Ejectment. Homestead. Before Judge ALEXANDER. Mitchell Superior Court. November Term, 1871.

This was ejectment by Mrs. Faircloth against St. Johns. So much of the proceedings below, as is necessary for an understanding of the opinion, is as follows: She showed the *locus* and tenancy and title in her husband; that he died and she took possession of the land, and had it set apart to her for a homestead of herself and minor children, and closed. Defendant showed the following facts: Faircloth sold the land to one Settles, took his two notes for \$1,000 00 and \$500 00, for the purchase-money, and gave him possession and a bond for titles, upon payment of said notes; that Settles paid the \$1,000 00 note, Faircloth transferred the \$500 00 note to Crawford and indorsed it; Faircloth died; Settles moved West, and Faircloth's administrator put Mrs. Faircloth in possession of the land; Crawford indorsed said note to Jackson, and Jackson indorsed it and sold it to This last owner of the note sued Faircloth and Crawford and Jackson, as indorsers on said note, obtained judgment and levied on the land as Faircloth's property. Before the sher-

Faircloth vs. Sr. Johns.

iff's sale, Mrs. Faircloth applied to have said land set apart as a homestead for her and her children. At the sheriff's sale, notice of the pendency of this petition for homestead was given, but the sheriff proceeded to sell the land, and it was bid off by Crawford and Jackson. They took the sheriff's deed and St. Johns, who held as Mrs. Faircloth's tenant, attorned to them. Subsequent to the sheriff's sale, the homestead was set apart as prayed for. The Court charged the jury that Mrs. Faircloth took said homestead subject to any equity growing out of the facts, and that the homestead was defeated by a sheriff's sale of the land, under a judgment founded upon a note for its purchase-money. The jury found for defendant. The charge is assigned as error.

J. J. BRADFORD; W. A. BYRD; VASON & DAVIS, by CLARK & GOSS, for plaintiff in error.

W. E. SMITH, by G. J. WRIGHT, for defendant.

McCAY, Judge.

1. The debt on which this *fi. fa.* was founded was the debt of Settle. Faircloth was only liable as indorser. As to Settle, it was given for the purchase of the land, and as to him and his family, it would be superior to the homestead, should one be claimed by them. As to Faircloth and his family, it is only a simple debt. His indorsement had for its consideration entirely another tract of land. As to *that tract*, it would be a debt for the purchase-money, but as to the tract sold to Settle, it is not a debt for the purchase-money. Had Settle paid any portion of the purchase-money, the sale of the land, under section 3528 of the Code, would convey the title to the purchaser at the sheriff's sale. But as it is, Settle having paid nothing, nothing was sold belonging to him, and the purchasers got nothing in the land under their lien against Settle. As to Faircloth, they got his title, subject to the homestead, since *his* obligation was only as indorser.

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What might be the equities of the holder of this note, as against Faircloth, it is not necessary to decide. They do not come before this Court as holders of the note, but as purchasers at the sale, and they stand only on their rights as such. Had they, before the sale, tendered to the administrator the amount of the other note, perhaps equity would have compelled him to make a title to Settle, and then the land might have been sold with a clear title and for a full price, as the property of Settle, though even then the widow's right of dower might be in the way, since the title was clearly in Faircloth at his death: *Day vs. Solomon*, 40 Ga. R., 32.

2. Upon the other point, we have decided, in 40 Georgia Reports, 293, that of the land be sold pending the application for homestead, the purchaser buys subject to the final judgment. The application is *pendente lite*, and such is also the provision of the Code, section 2018.

Judgment reversed.

JOHN AUDULPH, plaintiff in error, vs. J. W. JOSEY, administrator, defendant in error.

(BY TWO JUDGES.) When a motion was made to set aside a verdict on the ground that the defendant—the losing party—was prevented from attending the trial by serious sickness:

Held, That in such a case it is not necessary to file a brief of the testimony given at the trial, and it may be error in the Court to refuse the motion for that reason. 20th February, 1872.

Practice. New trial. Before Judge CLARK. Webster Superior Court. March Term, 1871.

In 1848 Josey, as administrator of Henry Audulph, filed a bill for account and settlement against John Audulph and one Rogers. They answered, denying the allegations. In March, 1871, a decree was taken against John Audulph.

Andulph vs. Josey.

Next day he appeared, showed that he had been kept away from the Court by his illness, and said he had a good defense to the action, and moved to set said judgment aside. He excused himself for not filing a brief of the evidence because he was absent, and his attorney having died since the answer was filed, he did not know what the evidence was. When his attorney died did not appear.

The Court superseded the judgment and ordered the complainant to show cause at the next term why the judgment should not be set aside. When the cause came up for hearing, the Court dismissed the motion because no brief of the evidence was filed. This is assigned as error.

C. T. GOODE ; C. B. WOOTEN, for plaintiff in error.

B. S. WORRILL, by W. A. HAWKINS, for defendant. As to new trials: 49th Common Law Rule; 4 Ga. R., 101; 5th, 399; 7th, 436; 23d, 493; 15th, 103.

McCAY, Judge.

If the facts, stated by the movant, justified the granting of the motion, we do not think it ought to be refused because he has not filed a brief of the testimony given in at the trial. In the first place, he was not there to hear it, and the very foundation of his motion is that he was prevented from being there by providential cause. This is not strictly a motion for a new trial. No error is complained of in either the Court or the jury. It is rather in the nature of a motion to set aside the judgment, for the reason that, for the reasons stated, the defendant could not be present to put in his defense. The evidence, as given in, sheds no light at all upon the propriety of the motion. The case stands upon the footing of a judgment against a dead man, or a judgment obtained by fraud. It is an accident. And if the Court is satisfied, from the evidence before it, that this accident did occur, and that the defendant's case has been passed upon to

McKay *et al.* vs. Kendrick *et al.*

his injury, when he was providentially absent, we do not think the rule of Court requiring him, on motions for new trial, to file a brief of the testimony, is applicable to the case.

We do not pass upon the merits of the motion, as that question has not been decided by the Judge, though we incline to think the motion ought to be granted.

Judgment reversed.

NEIL MCKAY *et al.*, plaintiffs in error, vs. GEORGE KENDRICK *et al.*, defendants in error.

- (BY TWO JUDGES.) 1. Where a defendant in ejectment relies on seven years' adverse possession, under color of title, he can claim, under such title, only so much of the land as the largest description in his deed will embrace.
2. If, at the time his grantor makes the deed to him, such grantor, by accident or design, points out more land than the largest description in the deed will embrace, and the defendant takes possession of the whole tract so pointed out, he is in, as to the overplus, only by the *pedis possessio*, and cannot set up prescriptive title as to that part unless he has so held it for twenty years.
3. The lessor of the plaintiff can recover of a mere intruder upon prior possession alone.
4. Where the lessor of the plaintiff is ejected, he cannot be said to have voluntarily abandoned, because he does not resume possession immediately on the land becoming vacant again, especially where the defendant's witnesses testify that no such vacancy ever occurred. 20th February, 1872.

Ejectment. Prescription, etc. Before Judge CLARK.
Sumter Superior Court. April Term, 1871.

For the facts see the opinion.

HAWKINS & GUERRY, for plaintiffs in error.

HAWKINS & BURKE, for defendants.

MONTGOMERY, Judge.

This was an action to recover a lot in the city of Americus, containing two and a half acres, known as the Bailey lot. The evidence shows that there is a piece of ground somewhat of the shape of an isosceles triangle, with its base along or near the Southwestern Railroad, and the apex at the bridge across Muckalee creek, at which point Lamar and Hill streets (the two streets which form the two equal sides of the isosceles triangle) meet. The base of the triangle is to the east, and the apex rests on Muckalee bridge on the west. This piece of ground was originally divided into three lots: the Faut lot on the east, the Bailey lot of two and a half acres in the middle, and the wagon-yard lot on the west, in the point of the triangle, and containing one and a half acres.

In 1854, Neil McKay bought the Bailey lot from one Duckworth, and went into possession. In 1856 it was sold as McKay's property under execution, and bought by John W. Fletcher, McKay's brother-in-law, who seems to have bought it in for McKay, as he permitted him to remain in possession. McKay continued in possession, either by himself or his tenants, up to some time in 1858, when he was, through his tenant, Mrs. Mays, evicted by the defendant, who claimed the lot under a deed from the sheriff, dated in February, 1858, which purported to convey to him "all that parcel of land, being and lying in the city of Americus, known and distinguished as the Wagon Yard lot, lying between the two streets leading to the bridge and Muckalee creek, and running down to a point at said bridge, containing two and a half acres, more or less." This sheriff's sale took place under an execution against the owner of the Wagon Yard lot, and the sheriff, in putting the defendant in possession, through ignorance of the eastern boundary of the Wagon Yard lot, pointed out the eastern boundary of the Bailey lot, as the eastern line of the lot covered by his deed.

Defendant found Mrs. Mays in possession of the eastern

portion of the land thus pointed out, and demanded that she should attorn to him, which she refused, saying she was the tenant of McKay. Whereupon, defendant threatened to evict her, and under this threat she consented to attorn to him.

Plaintiff showed no title back of Duckworth's deed. Defendant relied on adverse possession under color of title. As to whether his possession had been continuous or not there was much conflict of evidence—his witnesses testifying positively that it had been, while plaintiff's witnesses testified equally positively that it had not been. Defendant's position on this point was, that the adverse possession was either continuous or it was not; if continuous, the statutory bar prevailed, if not, as plaintiff could only recover, if he recovered at all, upon his prior possession, his failure to take possession, upon the temporary abandonment, by defendant, amounted to an abandonment on his part without any *animus revertendi*, and that, therefore, he must fail.

The Court charged the jury, "If McKay was in possession when the sheriff sold to Fletcher, Fletcher can recover on the possession of McKay against an intruder." "The defendant's possession must be covered by his deed from the sheriff. If he bought the Wagon Yard lot at sheriff's sale, and this property (the premises in dispute) was in the Wagon Yard lot, and he was in the continued possession for seven years before suit brought, the jury must find for the defendants. But if the property sued for was outside of the Wagon Yard lot, the deed from the sheriff cannot cover it, and he has no paper title, and for his possession to avail him it must have been for twenty years."

The jury found for the defendants, and plaintiffs moved for a new trial, among other grounds, because the verdict was contrary to the evidence and the charge of the Court. The Court refused a new trial. In this we think the Court erred. The verdict, in our opinion, was contrary to the evidence and the charge, as herein quoted, which was the law

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applicable to the case: Code, 3290; 5 Ga. R., 39; 11th, 119; 30th, 652.

The evidence shows that McKay was in possession when the sheriff sold to Fletcher; and the defendant's deed cannot possibly cover more than one acre of the Bailey lot, in any view that can be taken. As to the remaining portion he was clearly an intruder. Hence, we think a new trial should have been granted, and reverse the judgment of the Court below, upon the grounds stated in the head notes.

WILLIAM D. OWENS, plaintiff in error, vs. M. L. SANDERS,
defendant in error.

- (BY TWO JUDGES.) 1. A new trial will not be granted only because a verdict is too small in trespass *vi et armis*, unless it is shocking against the evidence. (R.)
2. Where, in an action for damages for an assault and battery by the defendant upon the plaintiff, the defendant was a witness and was examined in full upon the case, and during the trial a bill of indictment, with a plea of guilty, for the same beating, and a judgment affixing a fine of two hundred dollars was introduced by the defendant in mitigation of damages—and after the evidence was closed and the argument of the counsel on both sides to the jury concluded, the Court permitted the defendant to be re-introduced for the purpose of stating facts calculated to show that he had pleaded guilty under a mistaken impression deprived from the Solicitor General, that it would be cheaper to plead guilty than to attempt to defend and that the fine would be very small :
- Held*, That, if no reason was shown why this evidence was not offered before the case was closed and the argument heard, the admission of it, at the time, was not fair to the plaintiff, and a new trial ought to be granted.
3. Whether the evidence was admissible is questionable. (R.) 20th February, 1872.

Practice in Superior Court. Before Judge CLARK. Webster Superior Court. September Term, 1871.

Owens sued Sanders for beating him. Sanders pleaded only not guilty. Plaintiff put in evidence the beating and its circumstances, and his damages by loss of time, etc. Sanders, for himself, testified, at large, as to the beating and its circumstances, and, to mitigate damages, introduced a bill of indictment, by which it appeared that he had been indicted and had been fined \$200 00 therefor; and he swore that he had paid said fine. The cause was argued, and *then* the Court allowed Sanders to testify, over plaintiff's objection, that when he was indicted his counsel advised him to plead not guilty, but after consulting with the Solicitor, who said the fine would be light, he and his counsel agreed to said plea of guilty.

The jury found for plaintiff for \$30 00 and costs.

Plaintiff moved for a new trial, upon the grounds that the verdict was too small, under the evidence, and that the Court erred in allowing Sanders to make said additional statements after the argument was over. A new trial was refused and error is assigned on said grounds.

HAWKINS & GUERRY, for plaintiff in error. Defendant could not dispute or explain his plea of guilty to the indictment: R. Code, sec. 3700. Sanders' pleadings and evidence, 62.

B. S. WORRILL; J. L. WIMBERLY, by W. A. HAWKINS, for defendant. As to allowing the additional evidence: 41 Ga. R., 423; 24th, 384.

McCAY, Judge.

1. Although this is a very small verdict, under the facts of the case, we would not disturb it did we think there was no error in the Judge. The jury is the tribunal to assess damages, and though we do not think they have done full justice to the plaintiff, we are of opinion that the case is not so shocking an one as to demand our interference.

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2. But we do not think the defendant, under the circumstances, had the right to go again upon the stand to explain and rebut the effect of his plea of guilty. He had been fully examined. The record of the indictment, the plea and the judgment were his own evidence, introduced by himself. He had a fair opportunity to explain it when he was regularly on the stand. We are not clear that he could explain it. If his statement amounts to anything, it goes to show that he pleaded guilty under a false impression, derived from the statements of the Solicitor General, and his evidence goes rather to explain and contradict the record. At any rate, it was not fair to the plaintiff to permit this explanation, at the time, it was made. Doubtless it was the argument of the plaintiff's counsel, the conclusions he drew from the plea of guilty, that prompted this explanation. This was after the case had closed, and the plaintiff's witnesses probably gone. It is rather dangerous to the rights of parties to permit new evidence at all, under such circumstances. But if there had been a mistake, or new evidence be then just discovered, the ends of justice authorizes it. But no reason at all was here given why it was not introduced before. It was in the breast of the defendant, and he had a full opportunity to tell it.

It would be a very dangerous rule to permit one of the parties, though legally a witness, to sit by, listen to the argument of his opponent before the jury, and when a point is made upon the effect of his own documents, stop the cause and put himself up as a witness to explain and rebut it. True, the propriety of the matter ought, as a general rule, to rest with the Judge, but we think there ought always to be *some reason* given.

Had this verdict been fully up to a fair compensation to the plaintiff, we should not disturb it. But as we think this evidence was not properly admitted, and especially as the evidence is of very doubtful legality, we overrule the judgment of the Court refusing a new trial.

Judgment reversed.

Brown vs. Gill.

T. C. BROWN, plaintiff in error, vs. WILLIAM C. GILL, defendant in error.

(BY TWO JUDGES.) If a levy be made of a *fi. fa.* founded on a debt contracted prior to June, 1865, and there be no affidavit of payment of taxes, as required by the fifth section of the Act of 1870, the defendant may stop the progress of the *fi. fa.* by affidavit of illegality. 27th February, 1872.

Illegality. Relief Act of 1870. Before Judge CLARK. Lee Superior Court. September Term, 1871.

In December, 1861, Gill sued out an attachment against Brown's property, on a note dated the 8th of October, 1860, and indorsed by Brown to Gill. Judgment was entered by default in April, 1871. When the attached property was about to be sold, Brown made oath that the *fi. fa.* was proceeding illegally, because the said debt was contracted prior to June, 1865, and had never been scaled under the Relief Acts; and he claimed the right to scale it because, during the war, he had lost nine-tenths of his property—say \$50,000; because he had not notice of said suit; because Gill filed no affidavit as to the payment of taxes as required by the Relief Act of 1870, either before he took said judgment or before he caused the levy of the *fi. fa.* to be made. This affidavit was demurred to. The Court dismissed, with leave to Brown to move to dismiss the levy. That is assigned as error by Brown.

VASON & DAVIS, by CLARK & GOSS, for plaintiff in error.

C. B. WOOTEN, for defendant.

MCCAY, Judge.

It is true that the Act of October 13th, 1870, only provides for an affidavit, in case the plaintiff makes one. In such case, by the fifth section, the defendant may deny the truth of the plaintiff's affidavit. But the spirit of the pro-

Brewer vs. Broadfield.

vision applies as well to the case of the plaintiff undertaking to go on without the affidavit.

But, independently of this, it is clear that section fifth of the Act makes it *illegal* for the plaintiff to proceed without the affidavit. Why should not an affidavit of illegality apply as well to *this* illegal proceeding as to any other proceeding illegally?

We see no reason why it should not. Section 3614 of the Code authorizes the defendant to stop the plaintiff by affidavit, etc., whenever the execution is proceeding illegally. Under that section, if not under the fifth section of the Act of October 13th, 1870, this proceeding is authorized.

Judgment reversed.

WILLIAM H. BREWER, plaintiff in error, vs. JAMES M. BROADFIELD, defendant in error.

- (By two judges.) 1. Upon a motion to dismiss a suit for the want of the affidavit required by the Relief Act of 1870, it is not error in the Court to hear and pass upon the evidence offered in support of the motion, especially where no objection is made at the time.
2. No allegations in the declaration, which, if true, would excuse the payment of taxes under the Relief Act of 1870, will dispense with the affidavit required by the Act, unless sworn to. 20th February, 1872.

Relief Act of 1870. Tax. Before Judge CLARK. Summer Superior Court. October Term, 1871.

This was complaint by Brewer, as agent of Kapp & Daun, upon two notes made by Broadfield in 1862, at Americus, Georgia, payable to Kapp & Daun, or bearer. The case was dismissed under the circumstances stated in the opinion. That dismissal is assigned as error.

HAWKINS & GUERRY, for plaintiff in error.

C. T. GOODE, for defendant.

McCAY, Judge.

This was an action on a promissory note, dated before June, 1865, originally brought in the name of "William H. Brewer, agent." Plaintiff amended his declaration, by inserting, after the word agent, the following words: "for Kapp & Daun, who sue for the use of Jacob Kapp, a citizen of the State of New York."

After the amendment had been allowed, defendant moved to dismiss the action on the ground that the tax affidavit required by the Act of 1870 had not been filed. Defendant proved by a witness introduced, that Kapp left the State in 1863; that he had seen him since the war in New York; that Daun, one of the firm of Kapp & Daun, lived, and had lived all the while in Atlanta, Georgia. Whereupon, the Court dismissed the case without referring it to a jury. No objection was made by the plaintiff, at the time, to the Court's passing upon the question as to whether the case was such an one as required the tax affidavit to be filed. No proof was made that the paper belonged to Kapp, or that the partnership had been dissolved. The plaintiff excepted to the ruling of the Court on two grounds: 1st. Because the Court erred in determining to hear and pass judgment on the question presented by the motion to dismiss, and the evidence introduced in support thereof. 2d. Because the Court erred in dismissing the case at all.

If the plaintiff desired a jury, he could have obtained one by asking for it. If allegations in the declaration are held as a sufficient substitute, without proof of their truth, for the affidavit required by the Act, the law is nugatory.

We affirm the judgment.

Horne vs. Spivey.

J. R. G. and T. N. W. HORNE, administrators, plaintiffs in error, vs. L. E. SPIVEY, defendant in error.

(McCAY, Judge, having been counsel below, did not preside.)

1. An execution founded on an award against administrators in their representative capacity, which has been made the judgment of the Court, must follow the award, and can only issue against such administrators in their representative character, to be levied of the goods, etc., of their intestate.
2. If the execution, on such an award, is issued against the property of the intestate, and if none be found, then against the individual property of the administrators, it is a nullity, so far as it seeks to subject the individual property of the administrators to the payment of the debt, and if such property is levied on, upon affidavit of illegality, the facts not being controverted, the Court should sustain the affidavit of illegality.

Illegality. *Fi. fas.* Administrators. Tried before Judge CLARK. Sumter Superior Court. October Term, 1871.

The facts are in the opinion.

HAWKINS & GUERBY, for plaintiffs in error.

C. T. GOODE; W. A. HAWKINS; A. R. BROWN, for defendants.

MONTGOMERY, Judge.

The plaintiffs in error, as administrators of John E. J. Horne, submitted to arbitration certain claims held against the estate by Mary E. Byrd and the defendant in error. The arbitrators made their award, by which the amount due the defendant in error was awarded against the estate, and the administrators directed to sell certain property of the estate and appropriate the proceeds to the payment of the debt of Spivey, among other debts, Spivey claiming as assignee of an heir of the estate. The award is expressly against the administrators in their representative capacity, and that "the assets in the hands of Joel R. G. Horne and Thomas N. W.

Horne, as the administrators of John E. J. Horn, deceased, are subject to the claims of the said heirs," etc. There is no award against the administrators personally. The award was made the judgment of the Court, and Spivey took out execution to be levied *de bonis testatoris et si non*, etc. The administrators filed an affidavit of illegality on the execution being levied on their individual property. The Court overruled the affidavit, and ordered the levy to proceed. This was error. Had the arbitrators intended to find waste, we think they would have said so. On the contrary, there is evidence that they thought the administrators had faithfully fulfilled their trust. The award provides for the appointment of commissioners to take possession of the land of the estate and sell it, and appoints the administrators themselves the commissioners.

Judgment reversed.

JAMES H. NELMS, plaintiff in error, vs. **CLARK & MORGAN**, defendants in error.

(BY TWO JUDGES.) Where a mill was erected in 1866, and used in the ordinary manner since, until 1871, and a bill is filed to enjoin the mill owner from allowing the ebb and flow of the water below the mill, caused by the usual stopping and opening of the gate, on the ground that it produces sickness in the neighborhood, with special damage to the plaintiff, and it appears, by affidavits, that there is much conflict of testimony, as to the fact of the damage, and as to the ebb and flow being the cause of the sickness, it is no abuse of the discretion of the Court if he refuse the injunction until the facts are passed upon by a jury. 27th February, 1872.

Injunction. Nuisance. Before Judge CLARK. Sumter Superior Court. October, 1871.

Nelms averred as follows: He had for ten years owned a plantation, on which was a good and commodious dwelling, within a quarter of a mile of a good mineral spring, belong-

Nelms vs. Morgan.

ing to Glass. Nelms' family lived in the dwelling, enjoyed excellent health and fine social intercourse with the many visitors to said springs. In 1867, Clark built a dam across Chattahoochee creek, within a mile and a half of said dwelling, and erected there a grist-mill. Morgan has bought a half interest in the premises, and they are running said mill regularly. Now Nelms' family are very sickly, because of the malaria produced by this dam, and especially by the alternate overflow and drying off of the land below said mill. When the mill runs the land overflows, and when it ceases the surplus water runs off and the sun dries the land below. The health of the neighborhood has been so impaired that visitors no longer visit said springs.

Glass sued Clark & Morgan for damages to the springs, and obtained a verdict for \$300 00, but they protected themselves under the Homestead Act from any payment. Nelms also has sued them for damages, but the crowded dockets have prevented him from getting a hearing, and, defendants being insolvent, a verdict will do him no good. He has offered to buy the mill at such a price as disinterested persons would put upon it, but Clark & Morgan refused to sell in that way. He prayed the Chancellor to enjoin Clark & Morgan from further damming up said creek and using said mill.

In answer to a rule to show cause why injunction should not issue, defendants answered that the diseases of Nelms' family, if increased, were due to other causes than said dam and said ebb and flow of the water from the mill; that twice before injunctions had been refused in this case, and once affirmed by the Supreme Court, etc. They tendered bond for all the damages Nelms would recover in said suit.

On the hearing, very many affidavits were read, *pro* and *con*, as to the question of the increased illness of the neighborhood and whether this dam and mill caused it. The Chancellor refused the injunction. That is assigned as error.

C. T. GOODE, for plaintiff in error.

W. A. HAWKINS, for defendant.

Nelms vs. Morgan.

McCAY, Judge.

We do not care to go into the question of the *real* rights of the plaintiff in this case, as they may appear on a trial of the issue. The question now is only on the injunction until the hearing. It seems to us that there is nothing in the case to require the harsh remedy of an injunction.

This mill was built in 1866, and has been in use continuously since. It is rather a bold statement to say that a great pressing emergency exists, requiring the immediate application of an injunction, when the evil complained of has been going on for four or five years.

Besides, the injunction asked for is one of very questionable right. To prevent the ebb and flow of this water as complained of, is to stop the mill altogether. Perhaps to tear down the dam. We think Judge Clark was right in refusing such an injunction, until a jury has passed upon the very conflicting testimony that exists as appears by the affidavits. Whether the sickness is caused at all by the ebb and flow, seems to be a matter of opinion, in which the witnesses differ; and it is a well settled practice, that in a case of this kind the Judge ought to wait for the verdict before he applies so harsh a remedy as an injunction.

There are other important questions in this case, but as we, at present, only intend to pass upon the propriety of granting a temporary injunction, we will not discuss them, since, for the reasons given, we think there ought not to be an injunction until the questions made have been tried by a jury.

Judgment affirmed.

Kitchens *et al.* vs. Hutchins.

BOAZ KITCHENS *et al.*, plaintiff in error, vs. R. H. HUTCHINS, defendant in error.

- (BY TWO JUDGES.) 1. Where the bill of exceptions and the record are variant the latter governs.
2. Where counsel moved a continuance on the ground of sickness of his client, and stated in his place that he could not safely go to trial because he needed his client to prove his plea of relief, and the opposing counsel offered to admit the facts stated in such plea, the motion to continue was properly overruled.
3. Papers which are not properly a part of the record, though embodied in it, will not be considered by this Court.
4. Where a verdict and judgment are had against two defendants, on a joint and several contract, and it appears that one was never served, the verdict and judgment are void, only as to the one not served; the other can take no advantage of the error.
5. The verdict in this case was not contrary to equity and justice, nor to the evidence. 5th March, 1872.

Practice in Supreme Court. Continuances. Judgments. Before Judge CLARK. Sumter Superior Court. October Term, 1871.

The opinion recites the necessary facts.

JOHN R. WORRILL, for plaintiff in error.

LYON, DEGRAFFENREID & IRVIN, for defendant.

MONTGOMERY, Judge.

This was an action against the plaintiffs in error by Hutchins on two joint and several promissory notes, dated before June, 1865. One of the notes was for \$500 00, signed by both defendants as principals; the other for \$800 00, signed by Kitchens as principal, with Humphries as security. Humphries was never served. Kitchens filed a plea under the Relief Laws. When the case was called for trial, counsel for Kitchens moved for a continuance on account of the absence of Kitchens, who was too sick to attend Court, by whom he expected to prove the facts alleged in his plea of relief. The opposing counsel offered to admit the facts stated in the plea.

Whereupon, the Court overruled the motion. The case was tried on the 20th October, 1871, and a verdict and judgment were had by the plaintiffs against *both* defendants. At the same term of the Court Kitchens moved for a new trial, on the following grounds: 1st. Because the Court erred in refusing a continuance. 2d. Because the Court erred in allowing counsel for plaintiff to take a verdict and enter up judgment against defendants, when Humphries signed one of said notes as security, and was not sued as such. 3d. Because the Court erred in allowing verdict and judgment against defendants in the absence of any process to the declaration against Humphries. 4th. Because the Court erred in allowing judgment against defendants, when plaintiff's writ showed, by the sheriff's return thereon, an entry of not to be found as to Humphries. 5th. Because the verdict was contrary to evidence, equity and justice.

1. The Court overruled the motion for a new trial. There is no evidence in the record that there was an adjourned session of the October Term of the Court. On the 27th day of November, more than a month after the trial, and, it is presumed, after the adjournment of the Court, Kitchens made an affidavit before the Ordinary that he had paid one, if not both, of the notes sued on. On the 2d of December, the very day on which the bill of exceptions is certified by the Judge, Kitchens made another affidavit, that, as to the \$500 00 note, he was only surety for Humphries. The note, as stated, is signed by him as principal, and no evidence was offered on the trial that he signed only as surety. Whether the affidavits were ever submitted to the Judge of the Superior Court, and if so, for what purpose, does not appear. They could not have been made to sustain the motion for new trial, for they are not applicable to any of the grounds taken. Copies of these affidavits are attached to the transcript of the record and to the copy bills of exceptions furnished the Judges of the Supreme Court. How they got there, it is difficult to say. They are not attached to the original bill of exceptions.

Kitchens et al. vs. Hutchins.

2. Was the defendant entitled to a continuance on the showing made? Had counsel stated that he could not go safely to trial, in the absence of his client, without more, he would clearly have been entitled to a continuance: Code, 3473. But the statement of the reason why he desired his presence, shows that it was rather as a witness than as an assistant in the conduct of the case, that his presence was needed; and hence the offer to admit the facts, by the opposite counsel, that defendant was expected to prove, brought the case under section 3472 of the Code, and the continuance was properly denied. If the notes, or either of them, were paid, as alleged in the affidavit of Kitchens made November 27th, 1871, and this fact, and that Kitchens would prove it, had been stated in the motion to continue, it would have entitled the defendant to the continuance, on amending his pleadings by plea of payment, unless the fact had been admitted.

3. Perhaps if the motion for a new trial had contained the facts set forth in the affidavits of November 27th and December 2d, and a new trial asked for those reasons, and the affidavits submitted to the Judge in support of such grounds, he might have granted the new trial. As it does not appear from the record that this was done, the mere embodiment of the affidavits in the record cannot make them a part of it, and they cannot be considered by this Court in the shape in which they are brought before it.

4. As to the judgment being against Humphries, who was not served, and who, though a surety on one of the notes, was sued as principal. The notes sued on are joint and several, and Kitchens might have been sued alone. Had Humphries been served, plaintiff could have stricken his name and proceeded against Kitchens alone. There being a return of *non est inventus* as to Humphries, plaintiff was entitled to proceed against Kitchens: Code, 3274. True, the judgment is void as to Humphries, but Kitchens can take nothing by that.

The judgment of the Court is affirmed. (See the head-notes.)

Hiley vs. Hartridge.

The judgment of the Supreme Court, as pronounced from the Bench, was arrived at with the copy bill of exceptions before the Judges, when it was supposed that the affidavits mentioned were intended as a part of the bill of exceptions, and were meant to show, contrary to the transcript of the record, that a plea of payment had been filed, and that the defendant would have proved it had he been present at the trial. Hence the first proposition laid down by the Court.

The Judge below, in certifying the bill of exceptions, says "there was no point made before the Court about the want of process, or want of service on Humphries." The transcript of the record shows there was process against Humphries. If there had not been, it is not clear how Kitchens could have taken advantage of it.

JACOB HILEY, plaintiff in error, vs. A. J. HARTRIDGE, defendant in error.

- (BY TWO JUDGES.) 1. When a defendant permitted judgment to be obtained against him after the passage of the Relief Act of 1868, he has had his day in Court, and cannot afterwards open the judgment to let in the defenses provided for by that Act.
2. When a levy was made prior to the Relief Act of 1870, but no sale has taken place, the plaintiff *in fi. fa.* is not obliged to attach his affidavit of the payment of taxes to the execution, under the fifth section of that Act, so long as he takes no steps to force a sale. 20th February, 1872.

Relief Acts of 1868 and 1870. Conclusiveness of Judgments. Before Judge CLARK. Macon Superior Court. December Term, 1871.

The opinion contains the necessary facts.

W. A. HAWKINS, for plaintiff in error.

ELI WARREN, for defendant.

Carhart & Curd vs. Bivins.

MONTGOMERY, Judge.

This was a suit brought by the defendant in error against the plaintiff in error, on a note dated in 1861, and on which he obtained judgment in December, 1868; on which execution issued and was levied upon the defendant's property in November, 1869. No sale of the property took place, and after the Relief Act of 1870, defendant moved to open the judgment and avail himself of the defenses under the Relief Act of 1868, and moved, also, to dismiss the levy, because no tax-affidavit had been filed by the plaintiff in execution. There was no attempt being made by the plaintiff in execution to sell the property. The Court overruled defendant's motion as to the Relief Act of 1868, because he had had his day in Court, and should have made the defense provided for by that Act before judgment; and, as to the motion to dismiss the levy, because the levy had been made before the Act of 1870, and that Act only required the affidavit to be made in a case, like the present, where there was an attempt to force a sale of the property levied on.

We think the rulings of the Court right on both points. The first has already been decided more than once by this Court. The other, we think, a correct interpretation of the statute. We, therefore, affirm his ruling.

CARHART & CURD, plaintiffs in error, vs. GEORGE W. BIVINS, defendant in error.

(BY TWO JUDGES.) Where, in a suit by two persons on a debt due before the first of June, 1865, the proper affidavit of payment of taxes was filed, and on the trial before the jury the interrogatories of one of the partners were read, to the effect that he had always regularly given in and paid taxes on his solvent notes, and that the note sued on was solvent, and he had always included it in his tax-returns and paid taxes on it, as he believed, though he could not positively call to mind his giving in this particular note:

Carhart & Curd vs. Bivins.

Held, That it was error in the Court to dismiss the case ; there was sufficient evidence to carry the case to the jury, leaving them to determine whether or not the taxes had been duly paid, and whether or not the witness did not mean that he had, as one of the firm, given in this note and paid the taxes thereon. 27th February, 1872.

Relief Act of 1870. Before Judge CLARK. Sumter Superior Court. October Term, 1871.

Carhart & Curd sued Bivins upon his note, made in 1861. Before trial, affidavit of payment of taxes, as required by the Relief Act of 1870, was filed. On the trial, Curd testified : "I gave in my taxes in bulk, or rather returned in bulk all taxable property I owned, and have regularly done so for each and every year from the time I first owned said note to the present time. I regard the paper as solvent, and have classed it with my solvent debts, and have always returned it as taxable property, and paid regularly the taxes on same, in bulk, with other solvent assets."

The Court dismissed the cause because it was not proven that plaintiffs had paid all taxes required of them by said Act of 1870. This is assigned as error.

HAWKINS & GUERRY, for plaintiff in error.

C. T. GOODE ; W. A. HAWKINS, for defendant.

MCCAY, Judge.

We think this case ought to have gone to the jury. There was some evidence that the taxes were paid ; indeed, we think, had the jury found, under the evidence, that they were paid, we could not say that they found contrary to evidence or without evidence. The witness swears he had always included this note in his tax-returns, and that he had given it in every year. Why, as he was one of the partners, may not this have been the truth of the case ? Perhaps he was the active partner, and it may have been he that always made the return and paid the tax. Perjury ought not to be inferred. The witness

Irvin vs. Speer.

swears, very positively, that he did give in and pay the tax. What reason is there for saying he did not? If the jury believe the testimony, there ought to have been a verdict instead of a non-suit.

It is for the jury, and not the Court, to pass upon the proof of the payment of taxes. Here was some proof, and we think the Court erred in dismissing the case.

Judgment reversed.

S. D. IRVIN, administrator of BOND, plaintiff in error, vs.
THOMAS D. SPEER, defendant in error.

(BY TWO JUDGES.) Where A buys land from B before June, 1865, and gives his note for the purchase-money, and afterwards sells the land and receives payment, and his purchaser takes possession, and A is then sued on the note, he cannot be said to have been, at the commencement of the action, in possession of the property for the purpose of which the contract was entered into, even though he may not have made to the purchaser a deed. The case is, therefore, not with the 15th section of the Relief Act of 1870, and the usual affidavit must be filed. 27th February, 1871.

Relief Act of 1870. Before Judge CLARK. Sumter Superior Court. December Term, 1871.

For the facts see the opinion.

LYON, DEGRAFFENREID & IRVIN; W. A. HAWKINS, for plaintiff in error.

C. T. GOODE, for defendant.

MONTGOMERY, Judge.

The note, the foundation of the present suit, was given for lot of land number one hundred and twenty-eight, in the Fifteenth District of Sumter county. The defendant, Speer, went into possession, and continued so until he sold

to one Charles Bass, long before the commencement of this suit. Bass paid Speer for the lot and took his bond for titles, and has remained in possession, under that bond, from 1861 until recently, when he sold to his brother, and gave him his bond for titles. He did not make a deed, as Speer had made none to him ; which Speer did not do, because he had never received a deed from Bond, the plaintiff's intestate. Defendant moved to dismiss the case for the want of an affidavit of the payment of taxes, as required by the Relief Act of 1870.

Under this statement of facts, the Court decided that the case did not fall within the 15th section of the Relief Act of 1870, and that the affidavit was necessary, and for want of which he dismissed the case. We think the Court right, and affirm his judgment.

SARAH E. LEWIS, administratrix, plaintiff in error, vs. J.
R. G. HORNE, defendant in error.

- (BY TWO JUDGES.) 1. Where a widow, as administratrix of her husband, sues on a note made prior to June 1st, 1865, and offers to prove that herself and her minor children are the sole heirs of her intestate, that there are no creditors, and that the entire assets of the estate are less than the amount exempt under the homestead laws, the case should not be dismissed for want of the tax affidavit, under the Relief Act of 1870. Had the proof been made, it would have brought the case within the 14th section of that Act.
2. Where a tax-payer returns notes held by him in bulk, at what he considers them worth, and pays the taxes regularly on the gross amount so returned, it is a sufficient compliance with the Act to carry the case to the jury. 20th February, 1872.

Relief Act of 1870. Widows and minors. Before Judge CLARK. Sumter Superior Court. December, 1871.

Mrs. Lewis, as administratrix of her husband, sued Horne upon his note, made in 1861. She filed an affidavit as to

Lewis vs. Horne.

payment of taxes on the note, and Horne filed his counter-affidavit. She proposed to prove that she and her minor children were the sole heirs of her husband, that the estate owed no debts, and all its assets belonged to her and her children, and all were worth less than \$3,000 00, the sum exempt from sale under the homestead law; and contended that this case was excepted from the operations of the Relief Act of 1870. The Court ruled that said evidence would not except the case from the operation of said Act. Her agent then swore that, ever since she was administratrix, he gave in this note, with others, in bulk, at about \$1,500 00, for taxation, till 1870, when he gave them in at \$100 00, part, say \$1,000 00, having been sued and payment being pleaded before 1870. He did not remember giving in this identical note, but gave in all the claims, in bulk, at what he thought them worth.

The Court dismissed the cause because this was not sufficient proof of the payment of taxes.

HAWKINS & GUERRY, for plaintiff in error.

W. A. HAWKINS, for defendant.

MONTGOMERY, Judge.

This case comes up under the Relief Act of 1870—the suit being upon a note made prior to June, 1865, by the defendant in error.

An affidavit of the payment of taxes was filed, and the fact of such payment controverted by defendant. The payment of the tax was shown by the testimony of the agent of the plaintiff, in whose hands the note sued on, with others belonging to the estate, had been placed. He testified that he had regularly returned all of the notes for taxes at a gross amount, which he thought their value, and paid the taxes on such amount. The Court held the proof insufficient. In this, we think, the Court erred.

Ezzard vs. Worrill et al.

1. It is not necessary that the owner of a debt should return it at more than its fair market value: R. Code, sec. 801. And where such return is regularly made and the taxes paid, it sustains the affidavit required by the Relief Act of 1870. The fact that the debt is valued, with other debts, at a gross amount, and the whole thus returned can make no difference, provided the value placed upon them is what the person making the returns believes to be their fair market value.

2. The fourteenth section of the Relief Act of 1870 provided, that "nothing in this Act shall be so construed as to affect any claim due any widow or minor," etc. The facts offered to be proven by the administratrix would have clearly shown, if proved, that the sum sued for was a claim due a widow and minors. The Court should have allowed the proof.

Judgment reversed.

WILLIAM EZZARD, plaintiff in error, *vs.* JOHN R. WORRILL
et al., defendants in error.

(BY TWO JUDGES.) Where an accommodation indorser on a note made prior to June, 1865, has been compelled, by judgment, since that time, to pay the same or any part thereof, and sues the maker, securities and prior indorser, to recover the amount so paid by him, he is not obliged to file the affidavit of the payment of the taxes required by the Relief Act of 1870. The debt to him did not exist until the payment of the judgment by him. 27th February, 1872.

Indorsers. Relief Act of 1870. Before Judge CLARK.
Sumter Superior Court. December, 1871.

The facts are in the opinion.

C. T. GOODE, for plaintiff in error.

W. A. HAWKINS, for defendants.

Ezzard vs. Worrill et al.

MONTGOMERY, Judge.

In 1862, John R. Worrill, with E. H. Worrill as surety, made his note for about \$1,600, payable to N. J. Hammond, as guardian, or bearer, on which the other defendant was indorser. After his indorsement, Ezzard put his name on it as an accommodation indorser.

In 1869, Hammond obtained judgment against Ezzard in Fulton Superior Court, of the pendency of which suit the prior indorser, surety and maker were notified and requested to defend the same. Ezzard was compelled to pay off the judgment, and the present suit is brought to reimburse himself for the amount thus paid. Defendants moved to dismiss the suit for failure to file the tax affidavit required by the Relief Law of 1870. The Court granted the motion. We think the Court erred.

An accommodation indorser is considered merely as a surety: Code, 2123. Payment by him entitles him to proceed immediately against his principal: Code, 2134. If the payment was made under judgment, the amount of the judgment is conclusive against the principal: Code, 2135.

A surety cannot call on his principal until he has actually paid the money, and then only for the amount paid by him. *Powell vs. Smith*, 8 Johns., 249; *Bonney vs. Seeley*, 2 Wendell, 481. Hence, no debt is owing to the surety by the principal until the former has paid the original creditor, and not then on the note, but on the implied *assumpsit* raised by the law. *Powell vs. Smith*, *ubi. supra*.

This did not occur in the present case until 1869. Hence, we reverse the judgment below.

GEORGE P. THOMAS & COMPANY *et al.*, plaintiffs in error,
vs. G. W. STOKES, administrator, defendant in error.

(BY TWO JUDGES.) 1. When a Judge of the Superior Court, in the exercise of his discretion, grants or refuses an injunction, this Court will not interfere, unless such discretion has been manifestly abused.
2. Under special circumstances, the Court waived copies of the bill of exceptions and briefs. (R.) 20th February, 1872.

Administrators. Injunctions. Before Judge CLARK.
Chambers. Sumter county. January, 1872.

For the facts upon which the injunction complained of was granted, see the opinion. The cross-bill was to enjoin the administrator from selling the personalty, under the order of the Ordinary.

(The cause here was at the heel of the circuit, and unexpectedly reached. Counsel for plaintiff in error was absent, but other counsel proposed to represent him, if the Court would waive copies of the bill of exceptions and briefs being furnished them. This was objected to by opposing counsel, but was allowed.)

N. A. SMITH, by Z. D. HARRISON and R. H. CLARK, for plaintiffs in error.

P. COOK; W. A. HAWKINS, for defendant.

MONTGOMERY, Judge.

Thomas & Company and others, judgment creditors of the intestate, being enjoined by a mortgage creditor from levying on the land of the estate, threatened to levy on the personalty, consisting of mules, farming implements, corn, cotton, etc. The administrator filed his bill to enjoin these and other creditors, and stating he had applied for leave to sell the personalty, and prayed, when sold, the money might be brought into Court and distributed, under the direction of the Chancellor, alleging the insolvency of the estate, and that the claims were conflicting. Among the claims set up, as

Thomas & Company vs. Stokes.

conflicting with the judgment creditors, were liens upon the crops and mules for advances by factors, for more than \$6,000 00 : \$3,500 00, allowed the widow for year's support; an unknown amount of laborer's wages, an overseer's claim, in suit, as a preferred debt for \$1,300 00; other overseer's claims of \$300 00 and upwards; physician's bill for attendance in last sickness, homestead for minor children, and a tax execution against his intestate, as surety for the tax collector, for \$8,000 00, which had been levied on the house and lot of intestate in Americus. The value of the personalty, added to that of the house and lot in Americus, (valued at \$3,000 00,) against levying on which the judgment creditors had not been enjoined, amounted to, by estimate, \$14,575 00.

The mortgaged realty consisted of two plantations in Lee county, valued at \$18,800 00. The injunction sought by the administrator is resisted, on the ground that, after allowing for all of these claims, there is still over \$1,000 00 worth of personalty, subject to the judgment creditors. The argument of counsel is as follows:

“The bill states that Robinson & Company claim \$1,750 00, as a crop lien, and that Collins & Son claim a lien on the crop and mules for \$4,467 00, and that Mrs. Oliver claims \$3,000 00, as set apart for her year's support. The above amounts, (including certain judgments mentioned in a previous part of the argument, not quoted,) exclusive of interest and costs, and the United States Court judgments make the sum of \$13,473 77. The estimate in the bill of the personal property is \$11,575 00. Add to this the value of the city property in Americus, \$3,000 00, as stated in the bill, and the assets of the estate, exclusive of the land in Lee, amount to \$14,575 00, estimating the corn at eighty cents per bushel. The only other claim which can come for a share of this fund is the claim of Dr. Hawkins, for attention in the last sickness of Mr. Oliver, and this is not stated, but the whole amount of his bill will not make the *surplus*, \$1,101 03.”

“ Besides, the real estate in Lee is valued at \$18,800 00, on which Mr. Hondlett claims a lien of \$6,000 00, which he insists shall take precedence of the liens above set forth, and which are older than his mortgage.”

It will be perceived that counsel omit, in his reckoning, the overseer's suit for \$1,300 00, another overseer's claim for \$300 00, other overseer's claims, amount not stated, laborers' wages, of an unascertained amount, the homestead of the children for \$1,000 00, in gold, of personalty, and the tax execution for \$8,000 00, levied on the property in Americus, and for which the property of the surety is bound from the date of the bond. Code, 915. Besides, this is putting the years' support allowed to the widow at \$500 00 less than stated in the bill. It is said that there is no allegation in the bill that the tax collector is insolvent. The best indication that the administrator can have that he will have to pay the tax execution, is the levy on the property of the estate.

As to the land, the mortgage on that is for \$20,000 00, \$6000 00 of which are claimed as a debt preferred over all others; the claim of dower is also set up by the bill, amounting to one-third of all the real estate, including the residence in Americus, besides homestead for the minors amounting to \$2,000 00 more in gold. When all these items, omitted by counsel in his estimate, are taken into view, it will be perceived that, instead of the administrator having any *surplus* of personalty on hand, supposing these various preferred claims established, the estate, even including the land, will fall short of satisfying them, leaving the general creditor without assets out of which to satisfy his claim. It is difficult to imagine a case presenting more complication and embarrassment to the administrator, and it well entitles him to the interposition of a Court of equity: Code, 3089.

And the Chancellor having exercised his discretion in granting the injunction asked for by the administrator, and in refusing that asked by the defendants in their cross-bill, and the facts showing that there has been no abuse of that dis-

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cretion, under a well known rule of this Court, we affirm the judgment.

Judgment affirmed.

S. S. BOONE, administrator, plaintiff in error, vs. A. and W. MORGAN, defendants in error.

A judgment of a Judge of the Superior Court overruling a demurrer to a bill is not a proper subject matter for the consideration of this Court in a bill of exceptions brought here under the provisions of the Act of October 29th, 1870.

Equity Practice. Parties. Bill of Exceptions. Before Judge CLARK. Chambers. Sumter County. February, 1872.

A. and W. Morgan, sons of Hardy Morgan, upon the averments stated in the bill, asked that Boone, as administrator of Jackson, be enjoined from selling said land as the property of Jackson, and that he be compelled to make a conveyance thereof to Mrs. Daniels, formerly widow of Jackson. A demurrer to the bill was overruled and the injunction was granted. This is assigned as error.

ELAM & HAWKINS, for plaintiffs in error.

W. A. HAWKINS, for defendant.

MONTGOMERY, Judge.

This bill was filed by the defendants in error against the plaintiff in error, alleging that plaintiff in error, as administrator, had sold the reversionary interest of the estate in the dower of intestate's widow; that it had been bid in by the widow for \$2,000 00; that the father of complainants desiring to purchase the property applied to the administrator to know

if the widow's title was good; that he said it was, as the widow had an interest in the estate of more than two thousand dollars; that the father, Hardy Morgan, then bought; that the administrator did not make titles to the widow and he is now threatening to sell the land as the property of the estate. It nowhere appears what interest the complainants have in the land, except that their said father "being desirous of advancing to orators an amount of property, sought Mrs. Daniel (the former widow, who had married a second time,) to purchase the said land for the said purpose." Whether the titles were ever made to them or not the bill does not disclose. It purports to have attached to it a copy of the bond for titles and the deed, but no such papers are attached.

The bill further shows that Hardy Morgan made the purchase "and entered into possession of said land and property; and your orators further show that William Morgan is the owner of the lands that belonged to said estate, and they are now owning and using the entire plantation, except six or seven hundred acres, under the purchase aforesaid, and the latter purchase made by orator, William H." The prayer is that the administrator be decreed to make a title to the widow and that he be enjoined from selling.

1. Upon the whole, we think the allegations in the bill somewhat too meager and indefinite to warrant the injunction granted, and that Hardy Morgan and Mrs. Daniels should be parties complainant to the bill, or such facts be alleged as will show that they have no further interest in the matter. If the widow has made a warrantee title to Hardy Morgan, she is certainly interested in having the titles made perfect, and Hardy Morgan, for aught that appears in the bill, is still the holder of the legal title. All this, however, is proper subject-matter of amendment.'

2. The Act of October 29th, 1870, entitled "an Act to prescribe the practice in cases of injunctions and other extraordinary remedies in equity, and the manner of taking

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judgments on the same to the Supreme Court," makes no provision for this Court to review judgments on demurrer.

Judgment reversed so far as the injunction was granted.

D. A. COCHRAN *et al.*, plaintiffs in error, *vs.* C. H. STRONG,
for use, etc., defendant in error.

(By Two JUDGES.)—1. A written contract for payment of specifics not containing operative words of transfer is assignable so as to vest the title in the assignee, who may sue on it in his own name, under Revised Code, section 2218.

2. A written assignment "for value received" indorsed on such an instrument, the instrument not being a promissory note or bill of exchange, does not make the assignor liable as indorsee or guarantor of the instrument; hence he cannot be sued in the same action with the maker.

3. Where such an instrument is assigned to A who, in turn, assigns it to be B, and, by some means, it again comes into the hands of A, he cannot sue on it in his own name for use of last assignee.

4. Where a contract is for the payment of thirty-five bales of cotton, "the above mentioned cotton to be paid out of the cotton, to be paid by S. D. Bridgeman to the said Cochran, under written contract between them, bearing date 22d instant, and now in the hands of D. A. Cochran, and subject to the same liens and contingencies," it is impossible for this Court to construe the contract sued on, in the absence of that between Cochran & Bridgeman. 27th February, 1872.

Parties to Suits. Transfer of Contract for Specifics. Before Judge HARBELL. Terrell Superior Court. May Term, 1871.

C. H. Strong sued, for the use of A. C. Schaeffer & Company, Cochran as maker and King as indorser of the instrument copied in the opinion. Defendant contended that King was not liable on his said indorsement, and that suit on said paper could only be brought by King for the use of the party having the beneficial interest in the paper. The Court ruled against these positions. Defendants then sought to prove

that Bridgeman failed and never paid Cochran any of the cotton alluded to in said paper. The Court ruled out that testimony. Plaintiff had judgment against both defendants. Said rulings are assigned as error.

C. B. WOOTEN, for plaintiffs in error.

F. M. HARPER; GLENN & SON; CLARK & GOSS, for defendant.

MONTGOMERY, Judge.

The defendant in error sued Cochran and Benjamin King upon an agreement made by Cochran, whereby he promised to pay King thirty-five bales of cotton for an half interest in a plantation, the payment to be made out of certain cotton "to be paid by S. D. Bridgeman to the said Cochran, under written contract between them, bearing date 22d instant, and now in the hands of said D. A. Cochran, and subject to the same liens and contingencies." No copy of this last named agreement accompanied the record. The instrument sued on was indorsed—

"For value received, I transfer the within bond to Cicero H. Strong, March 22d, 1867. B. G. KING."

"For value received, I transfer the within bond to Adolphus C. Schaeffer & Co., of New York, August 1st, 1867. C. H. STRONG."

There were no operative words of transfer in the instrument. The judgment of this Court, as pronounced from the Bench, was as appears in the head notes.

Upon reflection and further examination, I am led to doubt the correctness of the second proposition as above laid down by the Court. The doubt is founded on the following authorities: Code, section 2731 to 2735, inclusive, and section 2740; *Clayton vs. Bussey & Ferrer*, 30 Ga. R., 946; *Seymore vs. Van Slyck*, 8 Wendell, p. 421, and authorities there cited. *Jones vs. Tales*, 4 Mass., 235; *Sawyer vs. Stimpson*,

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8 Ill., 260 ; Story on Promissory Notes, secs. 128, 129 and notes ; Chitty on Bills, 159 and notes.

The judgment of the Court below being necessarily reversed upon the other points in the case, nothing further need be said on the proposition now doubted. See *Southern Bank of Georgia vs. Mechanics Savings Bank*, 27 Ga., 256, pt. [2.] Judgment reversed.

L. L. HARRISON, plaintiff in error, vs. JOHN H. HATCHER,
trustee, defendant in error.

- (BY TWO JUDGES.) 1. The proper practice in preparing a motion for a new trial is, that all the rulings of the Court complained of during the trial, as well as the charges, and refusals to charge, of the Judge, shall appear distinctly in the motion, and be affirmatively recognized by the Court as true. But if such motion be made in writing, and notice thereof be given to the opposite party, and no rule *nisi* be granted, but it appear simply that the motion is argued and overruled, this Court will presume that the hearing was on a demurrer to the motion, in which the facts stated in the motion were admitted to be true.
2. Where A makes a deed to B for the purpose of defrauding the creditors of A, but retains possession of the land, and B brings ejectment, A may, by way of defense, set up the fraud under the rule, *in pari delicto potior est conditio possidentis*.
3. In such a case, grantees holding under a deed of gift from B, expressed to be for \$5 00, and for love and affection, stand in the same condition as their grantor, and are volunteers.
4. Declarations of one in possession of land, that the land is his, are admissible to show adverse possession, but not for any other purpose.
5. Where written requests to charge the jury are presented to the Judge, which are pertinent and legal charges in the case, as presented by the facts in evidence, and on material issues, which are refused by the Judge, a new trial ought to be granted, even if the verdict of the jury may be sustained, under the evidence, upon other issues in the case not covered by the requests to charge.
6. When, in an action of ejectment, it appear that both parties claim title from the same person, it is not necessary to show title further back than to the common grantor.
7. A trustee for a woman during her life, with directions to convey to

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her children at her death, may sustain an action against an adverse holder to recover the possession after the death of the mother.

8. When it was agreed that original deeds might be used in the argument of a motion for a new trial, and to the copy of the parol evidence various copy deeds were appended and sent up by the Clerk as part of the brief of the evidence, and the bill of exceptions contained no mention of such deeds, except that deeds, copies of which are attached to the brief of evidence, were read in evidence, this Court refused to dismiss the cause, because said copies were not certified to be copies of said originals. The Court said they would presume that to be so. (R. See end of Report.) 27th February, 1872.

Ejectment. Evidence. Fraudulent conveyances. Sayings of party in possession. Practice in Superior and Supreme Courts. Presumptions. Before Judge HARRELL. Quitman Superior Court. May Term, 1871.

This was ejectment by Doe, upon the demises of John W. Hatcher, as trustee for his named children and of Bird W. Tarver against Roe, casual ejector, and L. L. Harrison, tenant, for land in said county. It was begun on the 12th of October, 1869. The defendant pleaded not guilty, and a prescriptive right by seven years' adverse possession before the beginning of the suit.

Plaintiff traced title from the State to one West, in 1836, and read a deed from said L. L. Harrison to Joel Butler, made in March, 1838; a deed from said West to said Butler, made in May, 1838; a deed from Butler, made in February, 1855, to Jones, as trustee for Mrs. Martha Harrison and her children, free from the control or liabilities of her husband, L. L. Harrison, for her separate use, during her life, and at her death "said land to be conveyed to her children, share and share alike." He then put in evidence a petition by one Hyde, reciting that he married one of defendant's daughters; that Jones died without executing the trust aforesaid, and a prayer that said Hatcher be appointed trustee in lieu of said Jones, and an order of the Court, made in October, 1866, appointing Hatcher accordingly.

Hyde testified, that in 1858 and 1865, defendant told him

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that the lot was not his, but his children's, (but subsequently said it was his own,) and that defendant had been in possession thereof ever since Mrs. Harrison's death. The Court overruled a motion for non-suit. It was shown that she died in 1856 or 1857. It was shown that her children, the *cestui que trusts*, were alive. It was shown that L. L. Harrison gave in said lot for taxes in 1864, 1866 and 1867, the first two years as guardian for his children, and the last as their agent.

Defendant testified, that he purchased said land from West, and paid him for it \$1,500 00; took immediate possession of it, and remained in possession ever since, claiming it as his own, (and no one had ever paid him a cent for it;) that he had, all the while, been embarrassed, and gave in the land as his children's only to conceal from his creditors that it was his; he was never the guardian or agent of his children. He said, he meant by no one had ever paid him a cent for it, that Butler never paid him anything for it. The Court then ruled out the evidence above, in brackets. He further swore that when he bought the land from West, he, West and Butler agreed that Butler should hold the land for him. The Court here ruled out the testimony as to his buying it from West, and paying him \$1,500 00 therefor. It was then shown that defendant took possession of the premises, from West, between 1834 and 1838, and had been in possession ever since, and that Butler was defendant's father-in-law, and frequently said that Harrison paid for the land, and that he held the title to keep it from being sold for Harrison's debts.

Counsel asked the witness if, in 1854, Butler did not get mad with Harrison and say he would have nothing more to do with him. The Court would not allow the witness to answer, and remarked, in the hearing of the jury, that Butler made the deed, and it was immaterial why he did it. Butler was never in possession of the land.

Defendant's counsel requested the Court to charge the jury as follows :

1st. If Harrison paid for the land and the title was made to Butler without his paying anything for it, Butler holds for Harrison and plaintiff cannot recover. 2d. If Harrison paid the purchase-money for the lots and the deed was made to Butler to defraud Harrison's creditors, and Harrison remained in possession, the transaction was fraudulent, and Harrison cannot be ousted, even if the party holds the paper title, as a Court will not aid a party to a fraud to assert rights against the other party, and will not disturb the possession. 3d. If Harrison made the deed to Butler for a consideration and remained in possession ever since 1838, the jury might infer fraud, and if they believed the deed was fraudulent the plaintiff could not recover. 4th. Plaintiffs being volunteers and not purchasers, are in no better condition than Butler, and if Butler participated in the fraud upon Harrison's creditors, plaintiffs can not recover. There were several other requests of like purport. The Court refused to give any of them in charge to the jury. What he charged does not appear. The jury found for the plaintiff.

Defendant's counsel moved for a new trial upon the grounds that the Court erred in ruling out said evidence of defendant; in refusing to charge as requested; in ruling out the fact that defendant, while in possession, claimed the land as his own, and because the verdict was contrary to law, etc. The Court refused a new trial, and error is assigned on said points and others immaterial here.

When the copy of the oral evidence was made up it was recited that plaintiffs "read various deeds to the land in dispute," and "that the originals shall be used without copying for the purpose of their motion in the Court below." The bill of exceptions did not contain a copy of said deeds, but simply said the evidence "embraced in a motion for new trial, and the deeds, copies of which, and other papers attached to said brief, were offered and submitted to the jury." To the brief of evidence as sent up were attached copies of the deeds before mentioned. When the cause was called for

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trial here, counsel for defendant in error moved to dismiss it, because it did not appear affirmatively that such copies were copies of the deeds used on the trial. The Court overruled the motion, saying it would presume that they were copies of those used below.

A. HOOD, by KIDDOO, for plaintiff in error.

JOHN T. CLARK, for defendant.

McCAY, Judge.

1. It would be far better, and oft-times would relieve this Court from embarrassment, if it were always made distinctly to appear in the record on a motion for a new trial, that the grounds taken are or are not true. A motion is sometimes made and overruled, and it is impossible for this Court to say whether it was overruled because the Judge was satisfied there was no error in his ruling, or because he did not rule as stated. In this case we have had some difficulty in getting at the truth in this very particular. But, after much consideration, we have concluded that as this was a motion, not a rule *nisi*, and was overruled, it is fair to treat the judgment of the Court overruling the motion, as in the nature of a judgment sustaining a demurrer to the motion and assuming as true all the facts stated in the motion.

2. On looking into the cases upon this subject, we are satisfied that the rule *in pari delicto* applies to the condition of a defendant in a suit, even though he sets up his own fraud. He is in possession, and the Courts will not aid the other party to get possession under a fraudulent deed. They will even permit the defendant to say the deed, under which the plaintiff claims, is a fraud—the result of evil practices between him and me—and if this be made out by the proof, the plaintiff cannot recover: 16 Ga. R., 416; 20th, 600; 19th, 290; 22d, 431; 9th, 158; 11th, 547; 3d, 176, 182, 183; 2 Stewart's Ala. R., 192. And this same rule applies

as well to the parties as to those claiming under them, either as volunteers, or as purchasers with notice.

3. The deed, by Butler to the children of Harrison, though it expresses a money consideration of \$5 00, is, yet, upon the very face of it, only a voluntary deed, and based on love and affection. The \$5 00 is only nominal, and was introduced into such deeds to bring them within the statute of uses as deeds of bargain and sale, which imply a money consideration of some sort.

4. The declarations of Harrison, as to the character of his own possession, were properly admitted for the purpose of showing that he was holding adversely to the plaintiffs; not to show title, but merely to explain the nature of his possession: 18 Ga. R., 573; 19th, 167; Code, sec. 3721.

5. We are clear that the Judge erred in his charge, and in his refusals to charge, on the question of the right of the defendant to set up his own fraudulent conduct. As we have said before, (in second head note) as he was the defendant, and the plaintiffs were seeking the aid of the Courts to consummate the fraud, to make it effective, the defendant may defeat the action by showing the fraud. This was one of the principal issues in this case, and, though the verdict of the jury may, as we shall presently show, be *sustained* on other grounds, yet, as perhaps the jury would have found differently, had the law in this branch of the subject been properly given, we are compelled, under the rules of law, to grant a new trial.

As we have said, we think the verdict of the jury can be *sustained*, even though the rule be admitted in full, that Harrison may show his own fraud. The frequent admission by Harrison that it was his children's land, and the deed from Butler to them, as well as Harrison's acts in giving the land in for taxes, as the property of his children, are all facts of considerable weight, going to show that the deed from Butler to the children was by Harrison's direction or acquiescence, and was done as a bounty to the children, and not as a part of the original fraud. It does not appear that the passing

of the title to the children was part of the original plan, or that it was at all necessary to perfect it. If Harrison directed it, or acquiesced in it, as a compliance, by Butler, with the implied understanding between them, at the time of the original fraud ; that, when the storm blew over, he was again to have the land, and it was the free bounty of Harrison to his children, and not a mere additional device to keep it out of the way of his creditors, he is bound by it. There is evidence in the record to justify this, and had the Judge given the law correctly in the other points, we incline to think the verdict of the jury sustainable on this ground. But, as it was not demanded and required by the evidence, we think a new trial ought to be granted, that the true merits of the case, in all its phases, may go to the jury and be passed upon.

6. Nothing is better settled than that a plaintiff is not, in the first instance, bound in an action of ejectment to show title further back than the defendant. He is estopped, by his deed, from denying that he had title. This rule made the refusal to non-suit proper, as, in any event, the plaintiff had a *prima facie* right to recover one of the lots, since he had Harrison's deed to it.

7. The duties of the trustee are not fully performed until he turns the property of the trust over to the beneficiaries, dividing it among them as required by the deed of trust. Indeed, we incline to think that, as against everybody but the beneficiaries, he has a right to sue for any cause of action occurring during the existence of the trust.

Judgment reversed.

J. K. EVANS *et al.*, plaintiffs in error, vs. J. P. and W. C. BAIRD, defendants in error.

- (BY TWO JUDGES.)—1. Where in ejectment plaintiff shews title from the State to himself, and defendant relies on adverse possession under color of title, it is competent for plaintiff to show, in rebuttal, infancy on the part of one of his grantors, even after the evidence has closed and argument commenced, if the existence of such fact then come to his knowledge for the first time.
2. When a party claims adversely it is not necessary for him to shew that he went into possession *bona fide*. This will be presumed until the contrary appears. 27th February, 1872.

Ejectment. Presumption. Infancy. Before Judge HARBELL. Terrell Superior Court. May Term, 1871.

This was ejectment by Doe upon the several demises of Joshua K. Evans, Alexander Holmes and Thomas Holmes. It was begun in December, 1869. Plaintiff read in evidence a grant from the State to Alexander Holmes, traced title from Holmes to Henrietta V. Hart, read in evidence a deed from her to Eugene N. Hart, made the 9th of March, 1858, and a deed from him to Evans, dated the 7th of August, 1866. With evidence as to *mesne* profits, etc., plaintiff closed.

Defendants relied upon a prescriptive right (seven years' possession) to the premises. They read in evidence a sheriff's deed made in November, 1860, without the *fi. fa.* under which the sale was made. This was objected to, but the Court ruled that the *fi. fa.* was not necessary where defendants were only showing color of title. It was shown that defendant's possession, under said sheriff's deed, had been continuous since the date of said sheriff's deed.

After plaintiff's counsel had opened the argument to the jury, he stated to the Court that he had just learned that Eugene N. Hart was a minor until 1865, and proposed to amend by laying a demise in Hart's name, and to prove his infancy as aforesaid. The Judge said that such amendment would do no good, as he had shown title out of Hart and re-

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fused then to allow said proof of infancy. The amendment was not made.

In argument, plaintiff's counsel requested the Court to charge the jury that defendant's prescription was bad unless they held possession *bona fide*. He did not so charge. When his charge was ended, his attention was called to the failure to charge as requested, to which he replied that the request was not in writing, and did not so charge. He charged that the *fi. fa.* was not necessary evidence as a basis of color of title. The jury found for defendant. A motion for new trial was made upon the grounds that the Court had erred in the several rulings, charge and refusal to charge. He refused a new trial, and that is assigned as error.

VASON & DAVIS, by C. B. WOOTEN, for plaintiffs in error.

F. M. HARPER, by CLARK & GOSS, for defendants.

MONTGOMERY, Judge.

The plaintiffs brought ejectment against the defendants and showed complete title in himself from the State. One of the links in the chain of his title was a deed from one Hart to Joshua Evans, lessor of the plaintiff. Defendants claimed by adverse possession, and offered in evidence a deed from the sheriff to themselves, dated in November, 1860, which recited that the land had been sold as the property of one Sutton, whose name did not appear in the plaintiff's chain of title. Both sides having closed, the argument commenced, during which the plaintiff moved to withdraw the case from the jury, and to introduce evidence that Hart was a minor up to 1865, in rebuttal of defendant's claim by prescriptive title, stating that this evidence had just come to his knowledge. The Court refused to permit him to do so. The argument proceeded, and at its close plaintiff requested the Court to charge the jury, in substance, that unless the evidence showed that the defendants went into possession *bona*

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fide they could not claim by prescriptive title. The Court refused the charge. We think the Court should have admitted the evidence of the infancy of Hart, but that he was right in refusing the charge requested. If Hart's infancy was of sufficient duration, while the title was in him, to present the completion of the statutory bar, (as it was from the evidence, the deed to him being dated March 9th, 1858, and the deed from him being dated August 7th, 1866,) then his infancy was a complete reply to the adverse claim of the defendant, subject, of course, to any proof in rebuttal that the latter might be able to make. And the record shows no *laches* on the part of plaintiff in not obtaining knowledge of Hart's infancy before the trial.

Judgment reversed.

J. E. LOYLESS, plaintiff in error, vs. HODGES BROTHERS, defendants in error.

(BY TWO JUDGES.) When a garnishee had answered that he was not indebted to and had no effects of the defendant, and there was a traverse of his answer, and the plaintiff proved that the defendant had left with the garnishee a large box, for safe keeping only, the garnishee declining to be responsible for it, but permitting him to leave it in his store-house; that it was there at the time of the service of the garnishment, had been removed since, with the permission of the garnishee, by the defendant, and that it contained \$200 00 worth of goods:

Held, That a verdict for the plaintiff, for the value of the goods, was sustained by the evidence. 27th February, 1872.

Bailment. Garnishment. Before Judge HARRELL. Terrell Superior Court. May Term, 1871.

Hodges Brothers had a claim against one Mann, and garnisheed Loyless. He answered that he neither owed Mann anything, nor had any property or effects of his in his hands when he was garnisheed. This answer was traversed. On the trial, Loyless swore that he had a store, which he con-

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trolled exclusively, and that, by his permission, Mann left in it a box nailed up, the contents of which he did not know; that when Mann put them there, he told Mann that he would not be responsible for them in any way. They were there when he was garnisheed, and he allowed Mann to take them away. It was shown that the box contained goods worth \$200 00, and that Hodges Brothers' judgment against Mann was for more than \$200 00. The Court charged the jury that, if said goods were in the store which Loyless controlled when he was garnisheed, and he permitted Mann to take them away, Loyless was liable to plaintiff for their value. The jury found accordingly. A new trial was moved for, upon the ground that said charge was wrong. Its refusal is assigned as error.

F. M. HARPER; CLARK & GOSS, for plaintiff in error.

L. C. HOYLE; C. B. WOOTEN, for defendant.

McCAY, Judge.

Our law, Code, section 3226, requires the garnishee to answer what he is indebted to the defendant, or what effects of his he has in hand, or had at the service of the summons. Was not this box and its contents *in store* with the garnishee. True, he held it without risk, but it was none the less in his charge. He would have been liable for gross neglect, had any damage come to it. There are, it is true, some cases where sealed and unbroken packages, left as this was, have been held not to make the holder subject to garnishment. But it will be found that they turn mainly on the special law of the State, or on the fact that it did not appear that the package had any actual *value*. Here the clerk of the garnishee testifies, that the box contained goods, and that they were worth \$200 00.

We see nothing to justify us in saying that there were not "effects" of the defendant in the hands of the garnishee.

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They were in his custody—in his possession, as the will of the owner, and the verdict of the jury was right. The goods were turned over to the defendant by the garnishee, at his own risk, after the service of the summons.

Judgment affirmed.

JAMES A. ALLISON, administrator, plaintiff in error, *vs.*
HENRY R. THOMAS, executor, *et al.*, defendant in error.

- (By two judges.) 1. It is necessary for an administrator to file the tax affidavit required by Act of 1870, even though there are no debts, and a widow and minor are interested with others in the estate.
2. Every presumption will be made in favor of the constitutionality of an Act of a State Legislature. Where this Court has decided an Act of the Legislature constitutional, under which decision many private rights have been settled, and to disturb which might unsettle many others, and perhaps prove a great hardship to the plaintiffs in those cases already adjudicated, the doctrine of *stare decisis* applies. 27th February, 1872.

Relief Acts of 1870. Constitutional Law. Before Judge **HARRELL**. Randolph Superior Court. May Term, 1871.

Allison, as administrator of Key, sued Thomas, as executor of J. W. Thomas, and Douglass, as security, upon their promissory note made in 1860. No defense was filed. But plaintiff had filed no affidavit of having paid the taxes on the debt, as required by the Relief Act of 1870. To excuse himself, he proposed to prove that Key's estate owed nothing, and that two of his heirs-at-law were his widow and a minor, and contended that if the Acts were constitutional, which he denied, his case was excepted by its 14th section. The Court dismissed the cause for want of said affidavit. That is assigned as error on said grounds.

HOOD & KIDDOO, for plaintiff in error.

E. L. DOUGLASS; **C. B. WOOTEN**, for defendant.

Allison vs. Thomas *et al.*

MONTGOMERY, Judge.

The Court below dismissed this case for want of the tax affidavit required by the Relief Act of 1870, the suit being upon a note made before June, 1865. The plaintiff offered to show that the estate owed no debts, and that two of the heirs were a widow and minor, there being also adult heirs. The Court refused to let the proof be made. Plaintiff also objected to the dismissal on the ground that the Act of 1870 was contrary both to the Constitution of the United States and to that of Georgia.

The Court held the Act to be constitutional, and plaintiff excepted. Upon the hearing before this Court, counsel submitted the constitutional point without argument. And hence the decision in this case, as to that point, is placed upon the prior ruling of the Court holding the Act in question to be constitutional. After the present case had been heard, the constitutional question was elaborately argued in the cases of *The Macon and Augusta Railroad Company vs. Little, executor*, and *Johnson, administrator, vs. Sayre et al.*, decided at the present term, to which cases reference is made for the views of each member of the Court upon the subject.

We affirm the judgment of the Court below upon both rulings. If the widow and minor had been the *sole* heirs, the case would have fallen within the 14th section of the Relief Act. As it stands, we think the taxes should have been paid and the usual affidavit filed.

Judgment affirmed.

Cary, Bangs & Woodward vs. Edmondson.

CARY, BANGS & WOODWARD, plaintiffs in error, vs. J. L. EDMONDSON, defendant in error.

(BY TWO JUDGES.)—Non-residents of this State are not required, by our law, to pay taxes on notes held by them on citizens of this State, and when the payee of a note is the plaintiff in a suit on a note dated before June, 1865, and it appear that, at the date of the note, and continuously since, he has not resided here, and that he has been the owner of the note from its date, he is not required to make the affidavit of taxes being paid as required by the Act of October 13th, 1870. 27th February, 1872.

Taxes. Relief Act of 1870. Before Judge HARRELL. Terrell Superior Court. May Term, 1871.

Cary, Bangs & Woodward sued Edmondson upon his promissory notes dated in 1860, and purporting to have been made in Baltimore. He filed several pleas, one of which was that he ought to pay no interest because "said notes were held during the war by the parties who resided in the city of Baltimore and could not be paid." Because no affidavit of the payment of taxes had been filed under the Relief Act of 1870, the Court dismissed the cause, although their "attorney stated and offered to prove that they were non-residents." This is assigned as error.

R. F. SIMMONS, by Z. D. HARRISON, for plaintiffs in error.

WOOTEN & HOYLE, for defendant.

McCAY, Judge.

This case turns upon the non-residence of the plaintiff. We have decided in several cases that notes held by non-residents of this State, not used here, but only here for collection, are not taxable by our laws. The proof here is that at the making of the note, and continuously since, the plaintiff, to whom the note is payable, has not resided in this State. This the judgment, under these rulings, made, doubtless, since this decision by Judge Harrell, must be reversed.

Judgment reversed.

Heirs *vs.* Ward.—Rogers *vs.* Bottsford *et al.*

JOHN A. HIERS, plaintiff in error, *vs.* E. H. WARD, defendant in error.

There was no entry of service in the bill of exceptions, and for that defendant's counsel moved to dismiss it. Plaintiff's counsel said that the service of the bill of exceptions was entrusted to local counsel, and asked time to show that service was perfected. The Court refused to give time, and said service must appear on the bill of exception.

LYON, DEGRAFFENREID & IRVIN; W. G. PARKS; F. M. PARKER, for plaintiff in error.

C. B. WOOTEN, for defendant.

H. ROGERS, administrator, plaintiff in error, *vs.* E. E. M. BOTTSFORD *et al.*, defendants in error.

(BY TWO JUDGES.)—1. Where the amount due on a life insurance policy is payable in Hartford, Connecticut, to the "heirs or assigns" of the person whose life was insured, who leaves a will bequeathing all his property to his children, to the exclusion of his widow, and the agent of the insurance company pays the money to his administrator with the will annexed, the administrator is justified in filing a bill for direction as to the fund.

2. Pending the litigation the administrator is not liable to pay interest on the fund where he has made none. 27th February, 1872.

Interest. Insurance. Administrators and Executors. Before Judge HARRELL. Terrell Superior Court. May Term, 1871.

Rogers, of Georgia, averred that, in 1870, C. T. Bottsford died testate, and he became his administrator *cum testamento annexo*. The intestate was insured by the Phoenix Life Insurance Company, of Hartford, Connecticut, for \$5,000 00, payable to intestate's "heirs and assigns." This money was

paid to Rogers, as administrator. The will, made before the policy, simply bequeathed all his property to his "children," and in default of children to his brother, sister and step-mother. Testator had a widow and two children, him surviving and residing in Connecticut. Rogers prayed direction as to whom he should pay said \$5,000 00. The widow and children and other legatees were citizens of Connecticut. The policy of insurance described intestate, as of Dawson, Georgia, and it did not appear, by the record, where it was executed, but the premium was to be paid in Connecticut. Rogers testified that the agent of the company paid him the money saying the widow had no interest in it; that several good lawyers advised him she had none, and he had kept the money without making any interest on it, waiting the direction of the Court in the premises, and closed. There was no evidence in the record as to the law of Connecticut; it seems to have been admitted that by it the widow is not an heir of the husband. The Court ruled that the widow was entitled to one-third of the money; that the administrator had no right to collect it as it was not subject to intestate's debts, and that he should pay interest on the money. All this is assigned as error.

WOOTEN & HOYLE, for plaintiff in error.

LYON, DEGRAFFENREID & IRVIN, for defendant.

MONTGOMERY, Judge.

The plaintiff in error, as the administrator *cum testamento annexo* of Chauncey Bottsford, received from the agent of the Phoenix Mutual Life Insurance Company \$5,000 00 on a policy in which the company at *Hartford, Connecticut*, contracted to pay, in the event of the death of said Chauncey, the insurance money to his "heirs or assigns." The testator left all his property to his children, (of whom he had two,) to the exclusion of his widow, the defendant in

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error. Upon receipt of the money, the administrator filed a bill for direction. The agent of the company paid the money over to him in preference to paying it to the "heirs." The Court decreed that he should pay over one-third to the widow in her own right, as one of the heirs, and the remaining two-thirds to her as guardian of her children, and that he should pay interest on the fund from the time he received it, as he received it as a mere volunteer and not as administrator. The evidence was that he had made no interest. We think the Court erred.

1. Whether the widow is entitled to a share of the fund depends upon whether she is an heir of her husband by the law of Connecticut, *where the contract of insurance was made* and the money was to be paid. As far as made apparent, it would seem the widow is not an heir under that law, and that the administrator is entitled to the fund as such. The company at least thought so, and they certainly should be familiar with the laws of their own State, and most especially with their own charter, which may have an important bearing on the subject. Again, does not the will assign the fund to the children? Upon the whole view of the case the administrator might well hesitate as to whom the money should be paid, and is fully justified, under the circumstances, in filing his bill for direction.

2. In the mean time it would be inequitable to hold him liable for interest where he has made none.

Judgment reversed.

KETCHUM & HARTRIDGE, plaintiffs in error, vs. JAMES B. PACE, defendant in error.

(By two JUDGES.)—When a sheriff, by direction of the plaintiff, levied a distress-warrant for rent upon the crop made on the land rented and also on certain mules belonging to defendant on the place, and afterwards dismissed the levy on the mules, it appearing that they were under a mortgage of superior lien to the distress-warrant, and the mules were run off by the defendant:

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Held, That such levy and dismissal did not postpone the lien of the distress-warrant on the crop to younger liens. 27th February, 1872.

Lien of Judgments. Waiver. Before Judge HARRELL. Clay Superior Court. September Term, 1871..

Pace sued out a distress-warrant for rent against Jones & Jones, and under it sold certain cotton. Ketchum & Hartridge claimed that the proceeds should be paid to them, and Pace denied their right to it. On the trial the following facts appeared: Before this cotton was levied upon, the distress-warrant had been levied upon ten mules and horses, worth \$1,300 00, and said cotton, which were left on defendant's place by order of Pace. When the sheriff went back the next day or the day after that, these mules and horses were gone. Afterwards, under instructions from Pace's attorney, he erased that levy as to the mules and horses from the warrant. The mules and horses levied upon had been mortgaged to Ketchum & Hartridge, and Jones ran them off after said levy. Pace's attorney ordered the sheriff to dismiss the levy as to the mules and horses, because after they were levied upon he learned that they were covered by said mortgage which had been foreclosed. The mortgage *fi. fa.* put in evidence covered these mules and horses. It was conceded that Pace's lien was superior to that of the mortgage as to the cotton; but it was contended that the dismissal of the levy as to the mules and horses was *prima facie* satisfaction of the distress-warrant to the extent of their value, and that the explanation of the dismissal was insufficient to remove that difficulty, especially as by the levy, etc., Pace had caused these mules and horses to be put out of the way of the mortgage.

The Court charged the jury that an unexplained levy on personalty raised a presumption of payment to the extent of the value of said personalty; but that if the levy was dismissed because it was ascertained after it was made that the property could not be subjected to the payment of the dis-

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tress-warrant, because it was subject to a prior lien of a mortgage that was a sufficient explanation to remove the presumption of payment. He further charged that a mere levy and dismissal, under the circumstances, would not make Pace chargeable with having caused the property to be run off. The jury found for Pace. A new trial was moved for upon the ground that said charge was wrong. The Court refused a new trial, and of that complaint is made here.

WILLIAM GUERRARD ; HOOD & KIDDOO, for plaintiffs in error, cited R. Code, sec. 3607 ; 6th Ga. R., 392 ; 13th, 185 ; 30th, 433 ; 36th, 513, as to dismissal of levies.

H. FIELDER ; R. E. KENAN, for defendant, relied upon 30th Ga. R., 433 ; 36th, 511.

McCAY, Judge.

Without question, if there be a levy upon personal property, it operates as a satisfaction of the *fi. fa pro tanto*, unless the plaintiff show that it was unproductive. But he is not confined to one way of doing this. If, after the levy, he finds it is not the property of the defendant and he orders the levy dismissed, surely this is no satisfaction. The burden of proof is upon the plaintiff, but it would, as it seems to us, be very absurd to compel the plaintiff to go on to sell, or to litigate, when it is plain that the property is not subject.

It is admitted that the mules, the levy upon which was dismissed, were covered by the mortgage of the plaintiffs in error, and that if they had been sold under the distress-warrant, that mortgage would have taken the money, if it was foreclosed. If not foreclosed, the property would have brought nothing, unless it was sold under agreement. In any event, it would have been folly to go on with the levy, under the distress-warrant, and when the levy was dismissed, the property turned back to the defendant in the distress-warrant, the property was no longer a credit on the *fi. fa.*

We have looked closely into the cases referred to, but in none of them did it appear, as here, that the plaintiff making the levy, even with the utmost diligence, could have realized nothing from the property.

We are not able to see how the fact that this levy of the distress-warrant alarmed the defendant, so that, soon after the levy was dismissed, he ran away, carrying off the mules, can affect the case. Even in an action on the case for damages, it would be very difficult to sustain a recovery, for this reason, but surely that result is no reason why the holder of the distress-warrant should be charged with the value of the mules. It was the duty of the mortgagee to attend to his own business, and the holder of this distress-warrant only did his duty to the mortgagee when he dismissed this levy. It was not right that he should have the property sold, as it was bound under the mortgage, and there was not enough to satisfy it.

Judgment affirmed.

JAMES D. CARHART, plaintiff in error, *vs.* **CHARLES P. WEST *et al.***, defendants in error.

- (BY TWO JUDGES.) 1. The real plaintiff in the action may make the affidavit of payment of taxes, as required by the Act of 1870, even though the suit be brought in the name of another. 27th February, 1872.
2. The Court sat in May; the Clerk did not certify when it adjourned. The bill of exceptions was certified by the Judge on the 30th of June, and it stated that it was tendered to the Judge on the 26th of June, "within thirty days from the adjournment of the Court." The Court overruled a motion to dismiss said cause, because it did not affirmatively show that it was *certified* within thirty days from the adjournment of the Court. (R. See end of Report.)

Relief Act of 1870. Practice in Supreme Court. Before Judge HARRELL. Randolph Superior Court. May Term, 1871.

Carhart vs. West et al.

This was a suit in the name of Carhart, as bearer, against West *et al.*, upon their note made in 1860. He filed no affidavit as to payment of taxes. But one Atkinson, whose name did not appear in the declaration, and who made, so far as the record shows, no explanation of his connection with the suit, filed an affidavit that *he* "is the real plaintiff in said cause," and that *he* had paid all taxes required by the Act of 1870. For want of such affidavit by Carhart the Court dismissed the cause. That is assigned as error.

The bill of exceptions recited that the cause was tried at May Term and the assignment of errors therein began: "And now, on this the 20th of June, within thirty days from the adjournment of said Court, the plaintiff excepts," etc. It was certified by the Judge on the 30th of June, without any explanation by the Judge why he had held it up. *When the Court did adjourn did not appear.* Counsel for defendant moved to dismiss the cause because it did not appear that the bill of exceptions was certified within thirty days from the adjournment of the Court. No point was raised as to a want of any explanation of the Judge's delay. The Court held that the certificate of the Judge covered the recital above quoted and refused to dismiss the cause upon the ground that it affirmatively appeared that the bill of exceptions was *tendered to the Judge* within thirty days from the adjournment of the Court.

HOOD & KIDDOO, by JOHN T. CLARK, for plaintiff in error.

B. S. WORRILL, for defendant.

MONTGOMERY, Judge.

This being a suit on a note made before June, 1865, an affidavit of payment of taxes was necessary. One was, in fact, filed, made by M. J. Atkins, who swore he was the real plaintiff. On motion of defendants, the Court dismissed the

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suit, because the affidavit was not made by the plaintiff of record. Is it necessary that either real or nominal plaintiff should make the affidavit? Suppose the taxes paid by an agent, would not his affidavit of payment be sufficient? The second section of the Act of October 13th, 1870, does not require the plaintiff to *make* the affidavit. He must file "*an* affidavit" that the taxes have been paid. The Court has already decided that the real plaintiff may make the affidavit: *Demington vs. Douglass* decided August 22d, 1871. That case controls this.

Judgment reversed.

GEORGE SINGER, JR., plaintiff in error, vs. JOHN M. SCOTT,
defendant in error.

(BY TWO JUDGES.)—1. Where there were two suits pending between the same parties for the same cause of action, and the defendant makes a good cause for the continuance of the suit last brought, to-wit: that certain interrogatories sued out therein had not been returned:

Held, That it was error in the Court to refuse the continuance because the plaintiff had dismissed the suit first brought.

2. If pending a suit, another be brought against the same defendant for the same cause of action, the pendency of the first suit may be pleaded in abatement of the second, and the plaintiff cannot defeat the plea by dismissing the suit first brought. 27th February, 1872.

Evidence. Two suits for same cause of action. Before Judge HARRELL. Stewart Superior Court. October Term, 1871.

Scott filed an action of ejectment against Singer, and he pleaded the general issue. Pending that, he filed another against Scott for the same promises. To this one, Singer pleaded in abatement the pendency of the first. Singer sued out interrogatories in the first case, but they had not been returned to Court. When the first case was called Scott dismissed it. When the second was called Singer moved to

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continue *it* because said interrogatories were not in. The Court refused the continuance solely upon the ground that they were not sued out for the second case. Singer then showed the pendency of the first suit when the second was begun, and moved to dismiss the second for that reason. The Court overruled the motion because the first had been dismissed. The case was tried, and Scott had a verdict. Singer moved for a new trial, upon the grounds that the Court erred in refusing the continuance, and to dismiss said second suit, and for other reasons touching said trial, which are immaterial. The new trial was refused, and error is assigned upon said grounds.

H. FIELDER; BEALL & TUCKER, for plaintiff in error.

J. L. WIMBERLY; B. S. WORRILL, for defendant.

McCAY, Judge.

1. Had the Court refused the continuance, on the ground that movant had not shown due diligence, we should not have thought his discretion abused. But, as appears by the record, the showing was held sufficient, and the continuance refused, solely on the ground that the interrogatories sued out had been, in one case, when the case called was another suit, between the same parties, for the same cause of action, and the plaintiff had seen fit to dismiss the first suit, after bringing the second. It would be rather onerous upon a party to require him, at his peril, to sue out two sets of interrogatories for the same witness, about the same matter, simply because the plaintiff sees fit to bring two suits instead of one. There can be but one legally pending, even if they be both brought at the same time, so that, under the Code, he may elect which he will proceed upon. The interrogatories taken in either ought to be evidence. They are upon the same matter, between the same parties. Full opportunity to cross exists, and it would be sticking in the bark, in-

deed, to say that they cannot be used in either case, accordingly, as the plaintiff may select either one as his action.

2. But these cases were not both brought at the same time. The first objection, as well as the entry on the declaration by the Clerk, which is an official entry, required by law, and is, therefore, evidence, shows that the case called and tried was brought when there was another suit for the same matter pending in the same Court, between the same parties. In such a case, the Code, section 2843, provides that the pendency of the first suit may be pleaded in abatement of the second. The record shows that this plea was filed. It would be making this provision of the Code a nullity to permit the plea to be evaded by dismissing the first suit after the plea was filed. It would be in effect to give the plaintiff the right to elect, when the statute declares that, though he may do this, if the suits be brought simultaneously, the plea of former suit pending is a good plea to the latter, if the two be brought at different times. Our Code fixes the period at which a suit is pending, to-wit: When the writ is filed in office: Code, sec.

We think the Court erred in both these points. Especially is this true as to his rulings in the defendant's plea, and on the plaintiff's right to circumvent it by dismissing his first suit. Judgment reversed.

H. G. FEAGAN, plaintiff in error, vs. J. W. AVEN, defendant in error.

(BY TWO JUDGES.) There was no appearance for plaintiff in error.

Aven's Counsel moved to dismiss the writ of error because it was filed in the Clerk's office one day too late, and the motion was granted. Before the order was made, it was suggested that the last day was a day of thanksgiving proclaimed by the President of the United States. The Court said then it was safer to have the cause dismissed for want of prosecution. 24th February, 1872.

· No appearance for plaintiff in error.

M. J. CRAWFORD; J. L. WIMBERLY, for defendant.

Sawyer *vs.* Vories.

Z. M. SAWYER, plaintiff in error, *vs.* E. VORIES, defendant in error.

(By two judges.) Parol evidence is not admissible to add a covenant to a deed. 27th February, 1872.

Parol to vary writing. Before Judge HARBELL. Stewart Superior Court. October Term, 1871.

The opinion reports the facts.

E. L. DOUGLASS; H. FIELDER; BELL & TUCKER, for plaintiff in error.

J. L. WIMBERLY; J. T. CLARK, for defendant.

MONTGOMERY, Judge.

This was a rule to foreclose a mortgage by the defendant in error against the plaintiff in error, on a tract of land on which were two mills, and which had been bought by the plaintiff in error from the defendant in error for milling purposes, at a price, as alleged, of \$12,000 00; \$10,000 00 of which had been paid, and the suit was for the balance. The plaintiff in error set up as a defense to the foreclosure, in his answer to the rule *nisi*, a parol agreement by Vories, at the time of the sale, as part of the consideration of the contract, not to sell another mill-site owned by him, near the one bargained for, or if he did, to restrain the purchaser in his deed from erecting any mill thereon. The answer further stated, that Vories, in violation of this parol agreement, had sold the other mill-site, without restriction, and that the purchaser had erected a mill thereon, to the great damage of the plaintiff in error. The note, for the non-payment of which the foreclosure was sought, after reading in the usual form, had the following words added to it: "In purchase of the lands, etc., known as the upper Vories mill-place." The defendant in error demurred to the answer for insufficiency, and moved to make his rule absolute. The Court sustained the demur-

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rer, and granted the motion. We think the Court right in its ruling. In the case of *Mell vs. Mooney*, 30 Georgia, 414, relied on by the plaintiff in error, the question of adding to a written contract by parol did not arise, and the subject is but incidentally mentioned. The uniform current of the decisions of this Court is, that parol evidence cannot be received to enlarge or add to a written contract: See *Logan vs. Bond*, 13 Ga. R., 192; *Wyche vs. Winship*, 13 Ga. R., 208; *Griswold vs. Scott*, *Ib.*, 210. In the present case, the proposition is to add to the terms not only of the deed of sale of land to the plaintiff in error, but also to the terms of his note given for the purchase-money. It is in effect an attempt to engraft by parol a covenant upon the deed, and to add a condition to the note. We know of no case that has gone so far.

Judgment affirmed.

R. E. HARRIS, plaintiff in error vs. COLQUIT & BAGGS, defendants in error.

(BY TWO JUDGES.) Parties who appear before the Ordinary to contest the granting of a homestead are concluded by the judgment upon all questions which it is necessary for the applicant to prove, and upon all questions which the statute provides the creditors may make, but they are not concluded upon questions over which the Ordinary has no jurisdiction, unless it appears that they actually made such questions, and that they were in fact decided. 27th February, 1872.

Homestead. Conclusiveness of judgments. Before Judge HARRELL. Terrell Superior Court. November Term, 1871.

Colquit & Baggs, as merchants and factors, furnished to Mr. Harris provisions to enable him to make his crop in 1870, taking a factor's lien upon the crop to be grown. In the fall of 1870 they foreclosed the lien and had the *fi. fa.* levied upon corn and cotton, which were part of said crop. His wife, R. E. Harris, then made application to theordi-

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nary for setting apart as exempt from her husband's debts, certain personalty, including said corn and cotton. It was by the Ordinary set apart to her, and then she claimed it. Colquit & Baggs were represented by counsel before the Ordinary, and no appeal was taken from his judgment setting the same apart. What questions were made before the Ordinary does not appear. Under these facts it was submitted to the Judge whether the property was subject to the *fi. fa.* He held it was, and that is assigned as error.

LYON, DEGRAFFENBEID & IRVIN; W. G. PARKS, for plaintiff in error.

F. M. HARPER; R. F. SIMMONS, by CLARK & GOSS, for defendants.

McCAY, Judge.

The Act of 1868 providing for laying off the homestead, allows any creditor to appear and make certain objections to the proceeding. Literally, the only issue provided for is, upon the estimate of value by the Commissioners. But, in the nature of things, the objector may make a point upon any of the material statements necessary to be made; as residence, that applicant is the head of a family, etc.

We have held, also, that, if an objector does appear and set up that he has such a debt as that the applicant can include certain specific property in his schedule, and the applicant joins issue and the case is tried, this concludes the parties. But this is only when the issue is made and accepted. Either party may object, since this question does not come within any of the provisions of the homestead. The homestead, when set apart, is subject to certain debts, nevertheless, and it is only when, by mutual consent, this question has been actually tried and passed upon by the Ordinary, that the judgment at all affects the right of the creditor to go on.

The judgment concludes on all the facts necessary to appear before the Court can give a judgment. But the title to the land, and whether, notwithstanding the judgment setting aside the homestead, the debt of the objector may not still, levy on it, is not an issue in the case, unless the parties actually make it, and it is decided. In that case, the parties have by mutual consent waived the objection to the jurisdiction and a judgment binds them.

It does not appear that the plaintiff in this *fi. fa.* made any such objection. The presumption is that he only made the issues provided for by the statute, or necessary to appear before the homestead could be adjudged to be proper.

Whether after the homestead is laid off it is subject to the plaintiff's debt, is an independent question, and the laying off of the homestead does not decide it.

Judgment affirmed.

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ACCORD AND SATISFACTION.

A died, leaving a will providing that each of his children, on coming of age, should receive two negroes, at a valuation, and the balance of the estate remain together for the support of the others until the youngest came of age, when the whole should be equally divided, each accounting for the negroes received, according to their value. And one of the children came of

age in 1861, and received his two negroes and receipted for them at the value of \$1,100 00, and after the war and the emancipation of the slaves, all the legatees met and divided the lands equally, not charging the negroes received in 1861 against the legatee who received them, and making mutual deeds to each other of the lands falling to each, all being of full age and aware of the receipt of the negroes as stated:

Held, That, in the absence of any charge of fraud or mistake or ignorance, or of any other reservation or agreement, a bill is demurrable which prays a cancellation of the deeds to the legatee receiving the negroes, and seeks that he be compelled to account to the other legatees for their estimated value. The deeds are, *prima facie*, an accord and satisfaction, and if made without fraud or mistake, are binding as an executed settlement and division of the property bequeathed by the will. *Byrd vs. Byrd et al.*..... 258

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2. Where the amount due on a life insurance policy is payable in Hartford, Connecticut, to the "heirs or assigns" of the person whose life was insured, who leaves a will, bequeathing all his property to his children, to the exclusion of his widow, and the agent of the insurance company pays the money to his administrator, with the will annexed, the administrator is justified in filing a bill for direction as to the fund. *Rogers vs. Bottsford et al.*..... 652
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ALIMONY.

1. Where, in a libel for divorce, the Judge, after an examination into the cause and circumstances of the separation, and of the ability and unwillingness of the husband to pay, grants temporary alimony, this Court will not control his discretion, unless that discretion be abused. *Carlton vs. Carlton*..... 216
2. In determining the amount of the alimony, the Court may look into the property controlled by the husband, his ability to make an income, and determine from all the circumstances what is a reasonable sum to be paid as temporary alimony. *Ibid.*
3. When a libel for divorce was filed in 1863, in Jackson county, and with it a schedule of the property owned by the husband at the time of the separation, in which was included "a city lot, in the city of Atlanta," and the husband, in 1866, before the final verdict, sold the lot to a purchaser, who had no actual notice of the pendency of the libel, and the jury, on the final trial, granted to the wife a divorce, *a vinculo matrimonii*, and decreed to her, as alimony, the real estate mentioned in the schedule, for life, with remainder to the children:
Held, That under section 1720 of the Code, the sale by the husband, after the filing of the libel, the said sale not being in payment of pre-existing debts, did not vest the title in the purchaser so as to prevent the vesting thereof in the wife, according to the verdict of the jury, on the final trial of the divorce case. The purchaser bought subject to the said verdict, and his want of actual notice does not protect him. *Venable vs. Craig* 437
4. Negotiations and agreements between husband and wife, pending a libel for divorce, as to the alimony of the wife, and agreements between them in relation thereto, are, by presumption of law, merged in the final verdict of the jury in the divorce suit, and a purchaser from the husband, pending a suit, of property, mentioned in the schedule, is bound by the verdict, as is the husband, as to the legal rights of the wife to the property, unless he can show fraud in the verdict

affecting his rights, and to do this, he must attack the judgment before the Court which rendered it, as he is a privy thereto. *Ibid.*

5. When, in a schedule, filed with a libel for divorce, there is contained an item of "a city lot in Atlanta, worth \$5,000 00:"

Held, That, as the schedule purports to be all the property of the husband, the description is sufficient to put everybody upon notice, if there be, in fact, but one such lot. LOCHRANE, Chief Justice, dissenting. *Ibid.*

AMENDMENTS.

1. The plaintiff in attachment may amend his attachment as in other cases. *Kent & Co., vs. Downing*..... 116
2. When an attachment was issued on the 12th of August, 1870, and was by mistake, made returnable to the May Term, 1871, instead of November, 1870:
Held, That, on the mistake being made apparent to the Court, the attachment and bond may be returned, if the return was in fact made to the November Term, 1870. *Ibid.*

APPEARANCE—WAIVER BY.

See *Attachments*, 4, 5.

ARBITRATION.

1. It was not competent for an arbitrator to render an award in favor of the party, or interest, which had become the property of his son, pending the arbitration. The law which governs arbitrations demands the same freedom from all bias that applies to Judges or Courts, and the fact stated by the arbitrator, in this case, showing that, by his previous opinions expressed, his judgment had not changed by the subsequent purchase by his son, cannot make valid that which, from the fact of the purchase, when known to the arbitrator, and without notice to the other party, disqualified him to act in the case. *Spearman vs. Wilson et al.*..... 473
2. Where a controversy is submitted to arbitration, under the Code, and the arbitrators and parties have several meetings, at the first of which only two of the arbitrators are present, and no objection is made by either party at the time to the absence of third arbi-

trator, it is too late, on motion to make the award the judgment of the Court, to object to such motion on the ground of the absence of the third arbitrator from the first meeting, especially where the arbitrators were unanimous. *Akridge et al., vs. Pattillo*..... 585

3. Where numerous objections are filed to an award, on the ground that the award was the result of accident or mistake, or fraud of some one or all of the arbitrators or parties, or is otherwise illegal, all of which objections are, in effect, objections because the award is contrary to evidence, or the weight of evidence, the testimony submitted to the arbitrators should be before this Court to enable it to pass intelligently upon the objections made. Nor will the fact that the objections were demurred to for insufficiency dispense with this. *Ibid.*

ASSIGNMENT. See *Indorsers*, 2, 3, 4.

ASSIGNMENT OF ERRORS.

See *Practice in Supreme Court*, 2.

ATTACHMENTS.

1. Where there was an attachment pending in the Superior Court of Muscogee county against A, who was declared a bankrupt, and his assignee was appointed under the laws of the United States:
Held, That the assignee may be made a party to the attachment, and that it was proper, on his motion, to declare the attachment dissolved by the bankruptcy.
Kent & Co. vs. Downing 116
2. *Held, further*, That, pending such motion, the plaintiff in attachment may amend his attachment as in other cases. *Ibid.*
3. When an attachment was issued on the 12th of August, 1870, and was, by mistake, made returnable to the May Term, 1871, instead of November, 1870:
Held, That, on the mistake being made apparent to the Court, the attachment and bond may be returned, if the return was, in fact, made to the November Term, 1870. *Ibid.*
4. Objections to the form of the affidavit in an attachment are waived by the appearance of the defendant, and pleading to the merits. *Pool vs. Perdue*..... 454

5. A written notice to the defendant, that an attachment is pending against him, stating the Court to which it is returnable, and the time, and stating on what property it has been levied, is a sufficient compliance with section 3233 of the Code to authorize proceedings, as in an ordinary suit, especially if the defendant appear and plead to the merits. *Ibid.*
6. Where an attachment had been issued against A, and at the trial term it was agreed that B should be substituted for A, and the cause proceed against him :
Held, That this was a dissolution of the attachment, and the cause stood upon the footing of an ordinary suit against B, with service waived. *The Milledgeville Manufacturing Co. vs. Rivers*..... 479

ATTACHMENT FOR CONTEMPT.

Where the Judge has fully examined the ability of the party to pay alimony, and has reason to anticipate his disobedience to the order, he may direct that, if the money is not paid, attachment for contempt shall issue. *Carlton vs. Carlton*..... 216

ATTORNMENT. See *Landlord and Tenant*, 5.

ATTORNEYS—PLEAS BY. See *Pleading*, 3.

AUCTIONEERS. See *Bankruptcy*, 10.

BAILMENTS.

See *Carriers*.

“ *Garnishments*, 3.

BANKRUPTCY.

1. It is not a ground for non-suit that plaintiff has been adjudged a bankrupt since the suit was begun. (R.)
Woddail vs. Austin & Holliday..... 18
2. If plaintiff is adjudged a bankrupt after suit brought, the Court may direct the jury, if they find for plaintiff, to find that he recover for the use of his assignee in bankruptcy. (R.) *Ibid.*
3. Where there was an attachment pending in the Superior Court of Muscogee county against A, who was

declared a bankrupt, and his assignee was appointed under the laws of the United States :

Held, That the assignee may be made a party to the attachment, and that it was proper, on his motion, to declare the attachment dissolved by the bankruptcy. *Kent & Co. vs. Downing* 116

4. When the United States Courts, under the Bankrupt Act of 1869, have acquired jurisdiction of the estate of a bankrupt, the State Courts lose jurisdiction of all claims against him, provable under the Bankrupt Act, except specific liens upon his property, and legal or equitable claims of title thereto ; and the homestead and exemption provisions of the Constitution of 1868 do not create such a specific lien upon, or title to his estate, in favor of his family, as may be heard and adjudicated by the State Courts, pending the proceedings in bankruptcy. *Woolfolk vs. Murray. Bryan vs. Sims*..... 133

5. Whether said claim is such a debt in favor of the family as may be proven before the Bankrupt Court, independently of the exemption granted by the Bankrupt law to the bankrupt, it is for that Court alone to decide. *Ibid*.

6. The case of *Fannie Lumpkin vs. Eason*, at this term, having been, by permission, expressly questioned and reviewed, is, after reconsideration, affirmed. *Ibid*.

7. If a discharge in bankruptcy be pleaded, the Court cannot dismiss the cause on that ground, but must submit the issue to a jury. (R.) *Austin vs. Markham*..... 161

8. A promise to pay a debt due by an applicant to be declared a bankrupt, in consideration that the payee will withdraw his objections in the Bankrupt Court to the discharge of the bankrupt, is illegal and void, and no action can be sustained on such promise. *Ibid*.

9. Where a homestead was claimed, under the Act of 1868, by the wife of a husband, on his land, who had been adjudged a bankrupt :

Held, That the wife could not have a homestead on the land of her bankrupt husband, as against the assignee of the bankrupt, or those claiming title thereto under a sale made by the assignee of the bankrupt. *Lumpkin vs. Eason* 339

10. Clarence V. Walker was elected an auctioneer of the city of Augusta, and executed his bond as required by law. During his term as such auctioneer, he sold certain properties entrusted to him, and failed to pay over to the parties the proceeds. Walker and his securities upon the bond were sued, and the main question raised by the pleadings, and which is embraced in the two writs of error filed in this case is, that Walker pleaded his discharge in bankruptcy, which the Court allowed, and the sureties relied on the discharge of their principal for their discharge, which the Court disallowed.

We hold that the Court erred in holding that Walker was discharged under the facts in this case. The 33d section of the Bankrupt Act, March 2d, 1869, provides "that no debt created by the fraud and embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act." Waiving the question as to whether or not Walker was a public officer, under the Act of December 24th, 1827, we are clear in the opinion that the debt sued on was created while acting in a fiduciary character, and, therefore, did not entitle the discharge of the principal in this case.

Held, again, That the sureties on the bond were liable under the facts. Jones et al. vs. Russell. Russell vs. Walker 460

BIAS. See *Arbitration*.

BILLS. See *Promissory Notes*.

BILLS OF EXCEPTION.

See *Practice in Supreme Court*, 6, 7, 8, 9, 10, 11, 14, 15, 17.

BILLS OF PEACE. See *Equity Practice*, 3.

BLANK VERDICT. See *Equity Practice*, 2.

BLOOD. See *Guardians*.

BRIEF OF EVIDENCE. See *New Trials*, 15.

CAPTURE. See *War*.

CARRIERS.

Where a letter was written to B, at Rome, by the agent of the East Tennessee and Georgia Railroad Company in response to inquiries made by B, in which he states that "arrangements are perfected for sending cotton through to New York *via* East Tennessee and Georgia and connecting lines to Alexandria, by rail, and from thence by steamer, without detention, etc., etc., our rate from Dalton to New York on cotton is \$9 00 per bale; hoping to secure a liberal share of business from Rome, I am," etc., and this letter was shown to Montgomery, who shipped his cotton to Kingston, on the Western and Atlantic Railroad, and by the way of Dalton over the East Tennessee and Virginia Railroad through to New York, and damages were incurred by delays upon the route, after it had passed over the road of the defendant:

Held, That the letter written to B, by the Railroad agent, when shown to Montgomery, did not, without some notice to the railroad by him, that he had shipped his cotton via Kingston to Dalton, to be shipped by them in terms of such letter, constitute in itself, an express contract, so as to bind the company for loss or delay occurring beyond its terminus.

The contract imposed by the law, (see Code, 2058,) was to deliver to the connecting road in good order and due time, and to impose a greater liability required an express contract, and the letter addressed to B, did not, upon being read by Montgomery, constitute such an express contract. And his act of sending the cotton, without notice to the company, coming over another road and transported by them as an intermediate line, could not be regarded as embracing the terms of an express contract, arising out of the letter to B, as between such consignor without notice and such road.

Where the Court, upon the trial, gave in charge to the jury principles of law contravening the law stated, it was error, and a new trial should have been granted.

WARNER, Judge, dissenting. *The East Tennessee & Georgia Railroad Company vs. Montgomery*..... 278

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CERTIORARI.

1. When it did not appear in the record that written notice of the sanction of a *certiorari* had been given as required by the 3987th section of the Code :
Held, That the *certiorari* was properly dismissed. *Glenn & Son vs. Shearer* 16
2. Section 3987 of the Revised Code, requiring the plaintiff in *certiorari* to give the opposite party in interest written notice of the sanction of the writ, and time and place of hearing, at least ten days before the sitting of the Court to which it is returnable, etc., etc., applies to *certioraris* from the Justice Courts, and is still of force, under the Constitution of 1868. *Sparks & Tye vs. Burgheim*..... 167
3. When a *certiorari* has been sanctioned, but no notice, in writing, has been given to the opposite party of the same, ten days before the term to which the *certiorari* is returnable ; but it is, in writing, agreed between the parties that the decision of the Court upon the points made in the *certiorari* shall determine certain other cases pending on the same points, this is substantially a waiver of the notice and an agreement that the *certiorari* shall be decided upon its merits. *Scott, Bondurant & Adams vs. Patrick et al.*..... 188

4. When there was a *certiorari* from the County Court which, under the Act of 1866, Code, 297, is to be heard by the Judge of the Superior Court in vacation or in term, as should to him seem proper, and there was tendered to the Judge in vacation a traverse of the answer of the County Court Judge, and the Judge of the Superior Court thereupon, by written order, directed the papers and the traverse to be transmitted to the next term of the Superior Court for trial:
Held, That this was a judgment of the Judge that the traverse should be tried by the jury, and that, while that judgment stands unreversed, it is error to dismiss the traverse and withdraw the case from the jury, on the ground that the traverse was not verified by the affidavit of the party making it. *Mundy vs. Martin*.. 195

CERTAINTY.

- See *Alimony*, 5.
 " *Charge of the Court*, 8.
 " *Criminal Law*, 5, 9.
 " *Taxation*, 1.

CHARGE OF THE COURT.

1. It is error for the Court to charge the jury upon an assumed state of facts not disclosed by the evidence in the case. *Walker vs. Rixey*..... 28
2. As a matter of practice, where a legal, pertinent charge is requested of the Court, in writing, the Court should give it to the jury in the language of the request, and not hold up the paper containing the request, after the same has been read by counsel in the hearing of the Court and jury, and say, "Gentlemen, I give you all this in charge, as requested." *Leap-trot vs. Robertson*..... 46
3. Where there was evidence on one side that the consideration of a note was the price of a slave, and on the other, that it was given in settlement of a dispute about the title to twelve bags of cotton, it was the duty of the Court to charge the jury as to the law arising under the proof, under the evidence of both sides. *Collins et al. vs. Collins et al.*..... 128
4. That, as there was evidence, *pro* and *con*, as to the authority of the husband to pledge the watch, it was

the right of the defendant to have the law charged to the jury, in both aspects of the case, and as the Court charged the jury that the measure of damages was the value of the watch in any event, this was error, and the Judge erred in not granting a new trial. *Van Arsdale vs. Joiner*..... 173

5. When a written request was made by the defendant's counsel to the Judge to charge the jury, which request covered the whole case, and the Judge, in his charge, failed to follow the language of the request, but charged the law properly upon the points made, and upon the whole case, and the defendant was found guilty :

Held, The section 3664 of the Code, providing that a new trial *may* be granted on the refusal of the Judge to charge a pertinent charge in the language requested in writing, is not mandatory, but permissive only ; and when the Judge has, in fact, charged the language correctly on the points covered, and upon the whole case, and has refused a new trial, this Court will not, for this reason only, grant a new trial. *Powers vs. The State* 209

6. It is not error for the Court to charge the jury that the words as alleged in the declaration are libellous, as that is not an expression of opinion as to the evidence before the jury. *Pugh vs. McCarty*..... 383

7. It is error for the Court below to refuse to charge the jury when requested, in writing, in the language of the judgment of this Court, on the same statement of facts in a case between the same parties which had previously been adjudicated in this Court. *Ibid.*

8. It is not necessary for the Court to apply the law given in charge to the jury, to the facts of the case, when application is plainly apparent. *Goode & Son vs. Rawlins*..... 593

9. Counsel should request the Court to charge upon the material points in the cause. (R.) *Ibid.*

COMMON-CARRIERS. See *Carriers*.

COMMON OF PASTURAGE.

To entitle the plaintiff to recover in an action against a defendant for the unlawful interference with his right

of "common of pasturage," such right as against the defendant must first be established, and it must be shown that the defendant has *unlawfully* interfered with it. *Davis vs. Gurley*..... 582

CONCEALED WEAPONS. See *Criminal Law*, 4.

CONCLUSIVENESS OF JUDGMENTS.

See *Res Adjudicata*.

CONDITIONS PRECEDENT.

See *Corporations*, 2.

" *Insurance*.

CONFEDERATE MONEY.

See *Principal and Agent*, 2, 3.

CONFEDERATE CONTRACTS.

See *Scaling Ordinance*.

CONFLICT OF JURISDICTION.

See *Bankruptcy*, 4.

CONSTITUTIONAL LAW.

1. That part of the 15th section of the Act of 1870 which authorizes the defendant to elect to give up the property in his possession, for which the contract was made, in full discharge of his indebtedness, impairs the obligation of the plaintiff's contract, and is unconstitutional and void. *Abercrombie vs. Baxter et al.*... 36
2. When the Constitution creates an office to be filled by appointment of the Governor, by the advice and with the consent of the Senate, but legislation is necessary to carry the Constitution into effect, and an Act for that purpose is passed, which, by its express terms, does not take effect until a day subsequent to the adjournment of the Senate, the office is vacant, and may be filled by the Governor, until it is filled permanently as provided by the Constitution. It is immaterial whether the office has "become vacant;" it is sufficient that a vacancy exists; since in the former case the Governor may fill it, under the express words of

the Constitution, and in the latter case, he may fill it under section 66 of the Code, which authorizes him to appoint all officers and fill all vacancies, when no other mode is provided by the Constitution and laws.

WARNER, Judge, dissenting. *Gormley vs. Taylor*..... 76

3. When important and almost revolutionary results must follow from declaring a session of the Legislature illegal, the Courts are bound to require a most palpable and direct violation of the Constitution, before they interfere. It is the duty of Courts, in passing on the constitutionality of laws, not to pronounce against them except in a clear case, and to make every intendment possible in favor of their constitutionality. *Ibid.*
4. Whether it is in the power of the Courts to hold a law unconstitutional, on the ground that the Legislature passing it is not in session according to the mode prescribed by the Constitution, and to inspect its journals to determine the fact—*Query?* *Ibid.*
5. The Legislature having, by a vote of each house, declared that the session of 1870, was not a session after the second session under the Constitution of 1868, it is very doubtful whether this decision is not binding upon the Courts, as the judgment of a tribunal authorized by the Constitution to decide it. *Ibid.*
6. Article III., section 1, paragraph 3, of the Constitution of 1868, which provides that “the first meeting of the General Assembly shall be within ninety days after the adjournment of this Convention, after which it shall meet annually, on the second Wednesday in January, or on such other day as the Legislature may direct,” * * * *, and that “no session of the General Assembly, after the second, under this Constitution, shall continue longer than forty days, unless prolonged by a vote of two-thirds of each branch thereof,” may, in a very just and proper sense, be construed to mean by the words, “second session under this Constitution,” second session as provided for and specially required by this Constitution, so as to exclude the “two sessions,” called extra and irregular sessions, which, though legal, are not specially mentioned and required by the Constitution. *Ibid.*
7. The session of the General Assembly, which met on the day of July, 1868, more than ninety days

after the adjournment of the Convention, under the order of General Meade, and more than seventeen days before the Constitution of 1868, as decided by this Court in *Foster vs. Daniels*, 39th Georgia Reports, 39, went into operation, though a legal session may be called an extra or irregular session, and not one of the sessions meant by the Constitution in Article III. of the Constitution. *Ibid.*

8. The session of the General Assembly of 1870, may, therefore, be fairly said not to have been a session after the second session, within the meaning of the clause which prescribes that no session, after the second under this Constitution, shall continue longer than forty days, unless prolonged, etc., etc. *Ibid.*
9. Section 3987 of the Revised Code, requiring the plaintiff in *certiorari* to give the opposite party in interest written notice of the sanction of the writ, and time and place of hearing, at least ten days before the sitting of the Court to which it is returnable, etc., etc., applies to *certioraris* from the Justice Courts, and is still of force under the Constitution of 1868. *Sparks & Tye vs. Burgheim*..... 167
10. An attachment for contempt, in refusing to obey an order of the Judge to pay a certain amount of temporary alimony, is not prohibited by that clause of the Constitution of 1868, abolishing imprisonment for debt. *Carlton vs. Carlton*..... 216
11. That portion of the Act of October 13th, 1870, which allows the claimant of land subject to an execution to set-off against the judgment the losses of the claimant, by the late war, is in violation of Article I, section 10, paragraph 1, of the Constitution of the United States, and is, therefore, void. *Solomon vs. Lowry*..... 290
12. An Act denying all remedy on a contract would impair its obligation and be void. (R.) *West vs. Sansom et al.*..... 295
13. Where a party petitioned the Court for a *mandamus nisi* against the sheriff to compel his levy of a *fi. fa.* placed in his hands upon a homestead of realty set apart under the law, upon the ground that the Act of 1868, so far as it prevented the levy of a *fi. fa.* on such property or a judgment *fi. fa.* in existence be-

- fore the setting apart of such homestead, and granted a larger amount of exemption than existed under the law at the time of the contract, was unconstitutional and void, and the Court held the Act valid, and refused the *mandamus*: *Held*, That this was not error in the Court, under the rulings of the Court affirming the constitutionality of the Act, and protecting the sheriff from rule on account of its provisions from his refusing to levy said *fi. fa.* McCAY, Judge, dissenting. *Gunn vs. Barry*..... 351
14. Under the Constitution of 1868, which differs from the previous Constitutions of this State, in the grant of the power of pardon to the Executive, and contains only the same limitation upon the power that limits the royal prerogative in Great Britain, by Act of William the Third, which is incorporated into the Constitution of the United States, and by the Courts in Great Britain, and of the Supreme Court of the United States, which has been held to authorize the exercise of the pardoning power *before* as well as *after* conviction, it was error in the Court to reject this pardon upon that ground. *Dominick vs. Bowdoin* 357
15. Where it appears from the record that A. sued W. upon a promissory note, dated in 1868, and that W. had filed his plea under oath, that it was given in renewal of a contract, made before the 1st of June, 1865, and the Court dismissed it upon the ground that the Act of 1870 was unconstitutional:
- Held*, That the Court erred in dismissing the plea upon this ground. The law of 1870 is not *ex post facto*, for that applies to criminal, and not civil cases. The requirement that an affidavit be filed, that taxes due the State thereon have been paid, does not render it unconstitutional. If no tax was due, the law imposes none, and if the tax was due, creditors are not a favored class to be exempted from the payment of their legal taxes. The parliamentary law said to be violated, and, by it, the constitutional provisions for the passage of laws, does not operate to render it unconstitutional. Acts of the Legislature are presumed to be constitutional, and Courts will not declare them void, except in clear and urgent cases. It does not impair the obligation of contracts, for the law does not alter, modify or change a word in it; nor does it

- impair the remedy, but both stand untouched by the law, and the requirement of the payment of tax due on the contract, neither impairs the obligation of it, nor denies the remedy; and the fact presented by the plea, that the note sued on was given in renewal of an old debt, due before 1st June, 1865, if denied, was an issuable defense; if not denied, it stayed judgment until the law was complied with, and if denied, it was a fact to be tried by a jury. *Welborn vs. Akin*..... 420
16. When, on the motion to set aside a judgment made in the case, it appears that the note was given in settlement and consideration of a claim held, and a judgment transferred upon a third party, and was not within the provisions of the Act of 1870, while we hold the Court erred in dismissing the plea, still, by the facts, when it appears no injury was done to the defendant, and the facts set up sufficient to show the judgment would not be changed by a new trial and reversal, a new trial will be refused. *Ibid.*
17. The 5th section of the Act of October 13th, 1870, which authorizes a defendant in a *fi. fa.* to deny, under oath, the plaintiff's affidavit that the taxes due upon the debt had been paid, and providing that the issue thus made shall be returned and tried as other affidavits of illegality, stands upon the same footing as the first and second sections of the Act, and is not unconstitutional. WARNER, Judge, dissenting. *Connally & Bro. vs. Peck & Bowman*..... 430
18. The Act of 1869, authorizing attorneys to make oath to setting up issuable defenses to suits founded on contract, does not alter sections 3410 and 3412 of the Code, requiring pleas to the jurisdiction to be pleaded in person, and to be sworn to by the defendant. *Colquitt vs. Mercer & DeGraffenreid*..... 432
19. A commissioned Notary Public, as *ex officio* Justice of the Peace, under the Constitution of 1868, may issue an attachment, as any Justice of the Peace may, under the provisions of the Code. *Pool vs. Perdue*... 454
20. That portion of the Constitution of 1868 which confirms and makes valid the Acts of the Legislature of 1865 and 1866, was only intended to quiet doubt, and was not necessary to give them validity. In any event, as that body was a government *de facto*, in harmony

- with the United States, its Acts are good, *proprio vigore*. *Smith vs. Ordinary of Chatham county*..... 504
22. Every presumption will be made in favor of the constitutionality of an Act of a State Legislature. Where this Court has decided an Act of the Legislature constitutional, under which decision many private rights have been settled, and to disturb which might unsettle many others, and perhaps prove a great hardship to the plaintiffs in those cases already adjudicated, the doctrine of *stare decisis* applies. *Allison vs. Thomas et al* 649

CONTINUANCES.

1. This Court will hesitate to control the discretion of the Court below, as to a continuance, upon facts better understood by him than by this Court. (R.) *Marshall & Bro. vs. Clary*..... 511
2. Where an action of ejectment for a lot of land, by its number in the original State survey, had been pending against three persons as joint-tenants for several years before the adoption of the new rule of Court requiring the tenants in possession in actions of ejectment to admit themselves in possession before they will be permitted to defend, and after the case was referred to the jury the plaintiffs insisted on the rule, and two of the defendants disclaimed title to the west half of the lot sued for, but admitted themselves to be in possession of the other half:
Held, That it was not error in the Court to refuse to continue the cause on motion of the plaintiff, for the reason then first brought to the notice of the Court, that the other defendant was dead, and they desired to make his representatives parties to the suit.
 It was too late to continue the whole case unless the knowledge of the death had just come to the plaintiffs.
Payne vs. Ormond et al..... 514
3. Upon the trial of an indictment for adultery, it is error in the Court to refuse a continuance for the absence of two witnesses, who had been subpoenaed and were within the jurisdiction of the Court, by whom the prisoner expected to prove his innocence; and the fact of one being the woman accused does not change the rule. *Worthy vs. The State*..... 449

4. The fact that the Judge announces his readiness for parties to send for their witnesses does not necessarily deprive a prisoner, who has not availed himself of it, of his legal rights to a continuance when his case is called in its order for trial. *Ibid.*

5. When on a bill filed for an account and settlement of the affairs of a partnership, there was an answer, and the parties at issue, on the bill and answers, and there was a verdict for the plaintiff, and a motion for a new trial, on the ground that the Court erred in refusing to continue the cause, and it appearing, on the hearing of the motion, by the sworn statements of the absent counsel, that one of them was prevented from attending Court by providential cause, and the other, because the Judge had informed him, in open Court, at the regular term at the time he had fixed the day for the Adjourned Term at which the case was tried, that he had given Mr. Walker leave of absence from the Adjourned Term, and that none of his cases would be tried; that Mr. Walker was a leading counsel for the plaintiff in this case, and was counsel in all the cases in which the absent counsel was employed; that he had so publicly notified the Court, and that trusting to this he had not attended the said Adjourned Term :
Held, That it was no abuse of the discretion vested in the Judge, in such cases, to grant a new trial. *Smith vs. Brand.* 588

6. Where a sheriff is ruled by a plaintiff in *fi. fa.*, and answers, to which answer a traverse is filed, and plaintiff, at a subsequent term, proposes to withdraw his traverse and substitute another, it is impossible for this Court to say that the Court below abused its discretion in allowing the sheriff a continuance, on the ground of such substitution, unless we had the new traverse before us. *Goode & Son vs. Rawlins.*..... 593

7. Where counsel moved a continuance on the ground of sickness of his client, and stated in his place that he could not safely go to trial because he needed his client to prove his plea of relief, and the opposing counsel offered to admit the facts stated in such plea, the motion to continue was properly overruled. *Kitchens et al. vs. Hutchins.*..... 620

8. Where there were two suits pending between the same

parties for the same cause of action, and the defendant makes a good cause for the continuance of the suit last brought, to-wit: that certain interrogatories sued out therein had not been returned :

Held, That it was error in the Court to refuse the continuance because the plaintiff had dismissed the suit first brought. *Singer vs. Scott*..... 659

See *Garnishments*, 1.

CONTRACTS.

See *Administrators and Executors*, 2.

“ *Carriers*.

“ *Constitutional Law*, 1, 12.

“ *Husband and Wife*.

“ *Principal and Agent*.

CORPORATIONS.

1. The Augusta Factory, an incorporated company, is only liable, under the existing laws of this State, to pay a tax on the whole amount of the capital stock of the company paid in, and not on the market value thereof:
2. The Augusta Factory Company is liable for the payment of all legal taxes on the property owned by it as a corporation which is not included as a part of their capital stock and constitutes no part thereof. *McKAY*, Judge, dissenting. *Wilson vs. The Augusta Factory* 388
3. Where there was a subscription of stock to a railroad company, and when due the payment of the amount subscribed was demanded by the company, and payment was refused :
Held, That it was not necessary for the company to show that it had issued or offered to issue the certificates of stock as a condition precedent to a right of recovery on the subscription. *Fulgam vs. The M. & B. R. R. Co*..... 597

CORPORATION. See *Criminal Law*, 3.

COSTS.

A sheriff is not entitled to costs on tax *fi. fas.*, whether for State or county taxes, unless the same be collected

from the defendants. Nor does the fact that the *fi. fas.* issued illegally under order of the Inferior Court, alter the rule. *Keen vs. Rouse*..... 601

CRIMINAL LAW.

1. The Christian Sabbath is a civil institution older than our government, and respected as a day of rest by our Constitution ; and the regulation of its observance as a civil institution, is within the power of the Legislature, as much as any regulations and laws having for their object the preservation of good morals, and the peace and good order of society : 33 Barbour, 543 ; 1 Speers, 305. And it is within the right of the city of Atlanta to punish keeping open doors by dealers generally, in the limits of the city, upon Sunday, for the purpose of *preventing* the violation of the State laws, as well as preserving the public respect for the Lord's day. *Kerwisch vs. The M. and C. of Atlanta*..... 204
2. The offense of incestuous fornication is not a joint offense under section 4459 of our Revised Code, and one person may be indicted and found guilty thereof. *Powers vs. The State*..... 209
3. No precise rule can be laid down here, for the evidence of an accomplice in a felony must be corroborated by another witness, or by circumstances ; but a defendant cannot complain of the charge of the Judge on this point, who tells the jury that the evidence of the other witness, or the corroborating circumstances must be sufficient to satisfy them beyond a reasonable doubt of the guilt of the prisoner. *Ibid.*
4. Where, on the trial of a party charged with violation of the section 4454 of the Code, the Judge charged the jury, in effect, that army repeaters, having taken the place of horseman's pistols, were to be regarded within the exceptions of the statute, while used by parties on horseback, and the jury found the defendant guilty, and a motion made for a new trial was overruled by the Court:
Held, That the charge of the Judge was as favorable to the prisoner as the construction of the law would warrant ; horseman's pistols, excepted in the Code, having gone into disuse, and a pistol known as an army repeater having taken its place, if the latter was worn

by parties on horseback, in the same way as the former, we do not see but a fair interpretation of the law might bring it while so worn within the exception. But certainly not farther. And the evidence in this case showing that it was worn upon the person concealed, it was not error in the Court to refuse a new trial. *Puryear vs. The State*..... 221

5. Where an indictment charged the prisoner with simple larceny of a chestnut sorrel horse, of the value of \$100 00, etc., and the Court overruled a motion for acquittal, etc., upon the ground that the indictment did not describe the property stolen :

Held, That this was not error ; when the proof showed that the animal stolen was a horse, the allegation to that effect is sufficiently distinct and definite, under the Code, as to the nature, character and sex of the animal, and the allegation that he was a chestnut sorrel horse, was such a mark of identity as came within the requirements of the statute. *Taylor vs. The State*..... 263

6. An indictment against a negro need not describe him as a colored person. (R.) *Ibid*.

7. Hog stealing is not such an offense as can be settled in 4609th section of the Revised Code. *Brown et al. vs. The State*..... 300

8. In a charge of larceny, the property stolen was described as "one black pig, white listed ; and one white pig, with a blue rump ; both without ear marks ; and, together, of the value of \$2 00, the property of James Drake :"

Held, That this description is sufficient. *Ibid*.

9. An indictment is sufficiently technical, under section 4428 of the Code, that charges that the defendant, in the year 1870, did unlawfully employ the servant of one Phillip West, during the term for which he was employed, and that he was then in the employment of West, and that his term of service was not expired. *Bryan vs. The State*..... 328

10. Where the Court let in testimony of a previous employment by the defendant, though before the end of the year, and not in writing, it was error in the Court to charge the jury that such previous contract was no protection or justification, inasmuch as that question was one for the jury, under the facts. *Ibid*.

11. Where the evidence showed the person employed by the defendant had been previously employed by the prosecutor, to bring other hands with him to his plantation and superintend them :
Held, That such employment did not constitute such person a servant, within the provisions of the law. See concurring opinions. *Ibid*.
12. When an indictment charged and accused an unmarried woman with the offense of "fornication," for that she had sexual intercourse with a married man :
Held, That the indictment was bad, on special demurrer thereto, that the offense should have been charged as "adultery and fornication," in the language of the Code defining the offense. MCCAY, Judge, dissenting. *Bigby vs. The State*..... 344
13. Upon the trial of an indictment for adultery, it is error in the Court to refuse a continuance for the absence of two witnesses, who had been subpoenaed and were within the jurisdiction of the Court, by whom the prisoner expected to prove his innocence : and the fact of one being the woman accused, does not change the rule. *Worthy vs. The State* 449
14. The fact that the Judge announces his readiness for parties to send for their witnesses, does not necessarily deprive a prisoner, who has not availed himself of it, of his legal rights to a continuance when his case is called in its order for trial. *Ibid*.

COUNTY SITE. See *Equity Jurisdiction*, 6.

DAMAGES.

See *Equity Practice*, 3.

" *Measure of Damages*.

DECEIT. See *Equity Jurisdiction*, 7, 8.

DEDICATION.

See *Municipal Corporations*, 3, 4, 5, 6.

DIMINUTION OF RECORD.

ctice in Supreme Court, 5.

DISCRETION OF JUDGE.

- See *Alimony*, 1.
 " *Continuance*, 1.
 " *Injunctions*.
 " *New Trial*.

DISTRESS-WARRANTS.

See *Landlord and Tenants*, 3, 4.

DISTRIBUTION OF ESTATES.

1. This was a bill filed by the administrator of Billingslea, for direction as to the payment of the debts of his intestate, out of the assets in his hands, (the estate being insolvent,) including the widow's right to dower, homestead, etc. :
Held, That the necessary expenses of the administration, including the provision allowed for the support of the family of the intestate, be paid out of the general funds of the estate. *Rust, Johnson & Co. vs. Billingslea et al. Creighton vs. Jones et al.*..... 306
2. *Held, also*, That the decree of the Court below in favor of Milton Creighton, trustee, etc., be affirmed as to the amount thereof, and being a debt due by the intestate as *trustee*, is to be paid next after the expenses of administration and the year's support of the intestate's family. *Ibid*.
3. It appears from the record that, on the 11th of October, 1866, the intestate, Billingslea and Vason, jointly purchased from Jones the Mott and Clayton plantations, gave their joint notes therefor, Jones making a deed to them jointly for the land, and they, at the same time, jointly executed a mortgage to Jones on the land, to secure the payment of the notes given for the purchase-money thereof. The purchasers of the land occupied it jointly for one year, then Vason relinquished his interest in it to the intestate, who occupied and cultivated the same to the time of his death, on his own account. Jones was no party to the contract between Vason and Billingslea :
Held, That the *seisin* of the intestate of the land embraced in the Mott and Clayton plantations was sufficient, in law, under the provisions of the Revised Code of this State, to entitle his widow to dower therein ;

that a mortgage in this State is only a security for a debt, and passes *no title*; that the mortgage on the land was a *lien*, created by the parties making it, which cannot defeat the widow's right to dower; that, inasmuch as the mortgage lien on the undivided half of the Mott and Clayton plantations was not created by the intestate, as the *husband* of the widow, but by Vason, who subsequently conveyed the land to the intestate with the incumbrance of the mortgage thereon, the widow, before she can enjoy her dower in the undivided half of the land conveyed to her husband by Vason, with the incumbrance of Jones' mortgage, must first discharge that incumbrance created thereon by Vason to Jones, the same not being a lien created by *her husband*, but a lien which existed on the land at the time the husband acquired his title thereto from Vason. *Ibid.*

4. It is also disclosed by the record, that, on the 31st of January, 1868, Billingslea, the intestate, drew his draft in favor of Thomas Hill, for the sum of \$4,322 39, payable 15th November next after date, upon Messrs. Rust, Johnson & Company, Albany, and to secure the payment of that draft, the intestate, on the same day, executed his mortgage deed to Hill for his undivided half interest in the tract of land known as the Hill plantation, the sum specified in the draft being the amount due Hill by the intestate for his share of the original purchase-money for the Hill plantation. This draft was accepted by Messrs. Rust, Johnson & Company, for the accommodation of the drawer, and paid by them as such accommodation acceptors, they having no funds of the intestate drawer in their hands at the time of their acceptance of the draft. It also appears from the record, that Rust, Johnson & Company refused to accept the draft of the intestate, unless the mortgage was made, and that it was agreed that the mortgage should be transferred to them, on payment of the draft by them. The draft was paid at maturity, and the mortgage was transferred to them on the 25th of November, 1868:

Held, That, under the general rule applicable to the payment of the debt by accommodation acceptors, or securities, they would have been entitled to the transfer of the mortgage; most certainly they were entitled

to such transfer, under the *special agreement* of the parties, as shown by the record, and were entitled to the same specific lien on the Hill plantation, or the proceeds of the sale thereof, as the original mortgagee, and to have the same paid according to the priority of its lien upon that specific property included in the mortgage. *Ibid.*

5. *Held, also*, That the widow of the intestate was not entitled to a homestead and personal exemption out of his property, in addition to her dower and provision for her year's support. *Ibid.*
6. *Held, further*, That the factor's lien of Rust, Johnson & Company was not entitled to priority of payment out of the proceeds of the crops made on the Mott and Clayton plantations, in the years 1868 and 1869, on the statement of facts disclosed in the record. *Ibid.*
7. *Held, also*, That overseers, unless they are employed as common day laborers, and work as such on the plantation, are not entitled to priority of lien for the payment of their wages, under the Act of 1869. *Ibid.*

DOWER.

1. Under sections 1753 and 1759, of the Revised Code of this State, which provide that a widow is entitled to dower in all lands of which her husband died, seized and possessed, and that no lien created by the husband during his life shall in any manner interfere with the same, a mortgage made by the husband, for the purchase-money, contemporaneously with the deed to him by the vendor, passing, as it does, "no title," and being only a lien created by the husband, is no bar to her right of dower, nor is her dower subject to the same.

A widow is, in this State, entitled to dower in lands bargained by the husband, in his lifetime, to a third person, the purchase-money remaining unpaid and the title to the land being retained by the husband, in himself, until his death. LOCHRANE, Chief Justice, dissents. *Slaughter vs. Culpepper*..... 319

2. Where a note given for the purchase-money of land was traded after due, and a suit instituted by the transferee upon such note went into judgment in 1867,

and in 1869, the vendor of the land died, and his widow set up her claim to dower in the land, which was allowed her, upon the ground that the land came by inheritance through her, and she had not relinquished her right thereto, in terms of the law, and the vendor, the defendant to the suit upon the note, filed his bill in equity, praying an injunction and setting forth the facts, which was granted by the Court: *Held*, The transferee of the note, after due, took it with the existing equities between the original parties, and the claim for dower, under the facts, was not such an equity as the defendant was bound to plead to the suit in 1867, as the right did not ripen until after the death of the vendor, in 1869, and that this Court will not interfere with the judgment of the Court below in granting an injunction restraining the collection of the judgment, at law, until the hearing under all the facts in this case. *Wright vs. McDonald*..... 452

See *Distribution of Estates*, 3.

EJECTMENT.

1. The 7th section of the Act of 1869, limiting the time of actions for torts committed, applies only to such torts as were committed prior to the 1st June, 1865, and not to torts committed since that date. *Baker vs. Roath et al* 33
2. Where ejectment was proceeding against one who claims that his children owned the land, and he offered to make them parties defendants. he should have been allowed to do so. (R.) *Wilborn vs. Whitfield's executors* 51
3. And such party had the right to introduce a will under which the children claimed, and to prove that the premises in dispute were part of the property devised by said will to said children. (R.) *Ibid*.
4. When a deed had been submitted to a jury conveying lot number one, in the village of Cedartown, and a fraction west of said lot, and it was proven that there were two fractions belonging to the grantor, one small and immediately west, of a triangular shape, lying between lot number one and a public road, and one nearly equal in size, also west, but on the other side of the road :

Held, That it was not error in the Court to charge the jury, in effect, that *prima facie* the smallest fraction, and the one immediately west, was intended. *Willingham vs. Noyes*..... 248

5. Where A, being in possession of land under a bond for titles, on the payment of the purchase-money, made by B, sells the land to C, representing his titles to be perfect, and makes to C a bond for titles, to be made on the payment by C of the price agreed upon between them, and C, having no knowledge of the defect of A's title, or that his possession was only permissive, in good faith goes into possession under his purchase, pays his money in full, and remains in undisturbed possession seven years:

Held, That C has a good title by prescription, as against B, the original vendor. *Garrett vs. Adrian*..... 274

6. Where an action of ejectment for a lot of land, by its number in the original State survey, had been pending against three persons as joint-tenants for several years before the adoption of the new rule of Court requiring the tenants in possession in actions of ejectment to admit themselves in possession before they will be permitted to defend, and after the case was referred to the jury the plaintiffs insisted on the rule, and two of the defendants disclaimed title to the west half of the lot sued for, but admitted themselves to be in possession of the other half:

Held, That it was not error, in the Court to refuse to continue the cause on motion of the plaintiff, for the reason then first brought to the notice of the Court, that the other defendant was dead, and they desired to make his representative parties to the suit.

It was too late to continue the whole case unless the knowledge of the death had just come to the plaintiffs. The disclaimer by the living defendants, presented as to them, only an issue as to the east half of the lot sued for, which was the only thing tried. The rights of the deceased defendant are not affected by the verdict. *Payne vs. Ormond et al.*..... 574

7. On the trial of an action of ejectment, it was shown that a certain deed, purporting to be from the State's grantee, was lost or destroyed, and the interrogatories of a witness were offered, who swore that he had seen

the deed; that it, with the original grant, had been passed to him as part of the muniments of title, on his purchase of the land, about the years 1826–1830, from the brother-in-law of the assumed maker of it; that he did not remember the witnesses, and that he thought he had sent the deed to DeKalb county for record, though he could not say it was recorded. It was in proof by other witnesses that the original grant had been in possession of the supposed maker of this deed in 1826, and not afterwards, though it was stated by a witness that the grantee had said that the grant was burned with his house. It was also in proof that, soon after 1826, the supposed maker of this lost deed ceased to give in the land for taxes with his other lands which he had previously regularly done each year since the drawing. It was also in proof that both the maker and grantee of the supposed deed were dead, and that the Court-house and records of DeKalb county had been destroyed by fire:

Held, That altogether, these circumstances were proper to go to the jury as evidence worthy of consideration to show the genuineness of the deed, and to justify a charge of the Court, treating them as evidence upon that point. *Ibid*.

8. Under the Act of 1856, when an adverse possession of lands has commenced in the lifetime of the claimant, the Statute of Limitations did not cease to run at his death (except as against his minor heirs, lunatics, *femes covert*, etc.) in favor of his estate, unless administration be taken out within four years from the death; and if administration be delayed longer than this, the five years are not to be counted out in favor of the administrator. *Ibid*.

9. When an action of ejectment is brought by an administrator, and the defendant sets up a title by prescription commencing before the death of the testator:

Held, That in this State, even in an action at law, under the plea of the general issue, the defendant may sustain his prescriptive title by showing that the deceased left no debts, and that his heirs-at-law were all of age at the death of the intestate. And this is especially true of the full age of the heirs; and the mere existence of debts is no evidence, without objection by the administrator. *Ibid*.

10. Section 3670 of the Revised Code, requiring the Court to arrest the cause on the filing an issue of the forgery of a deed, and to try the issue thus tendered, applies only to registered deeds, and does not cover a cause where there is no registry and the party producing the deed takes upon himself to prove the execution thereof. *Ibid.*
11. A mere squatter on a lot of land, without color of title or claim of right, cannot defeat the title of the true owner by conveying the land to other purchasers, who have full knowledge of the nature and character of the title when they purchase it, although they may have been in possession of the land for seven years under such title. The law will not permit the true owner to be defrauded of his land in that way. *Brown et al. vs. Wells*..... 573
12. When a defendant claimed a prescriptive right to a lot of land, under a bond for title, on the ground that he had possession of the same by the exercise of such acts of ownership as the owners of such property usually do, though not living on the lot, and the Court charged the jury that the use and occupation of the land by the defendant must have been continuous, "that is, *from day to day, month to month, and from year to year*:"
Held, That this charge of the Court was error, in view of the evidence contained in the record. *Saterfield et al. vs. Randall et al.*..... 576
13. When, on the trial of an action of ejectment to recover the possession of a lot of land, it became a material question whether a certain deed offered in evidence was a forgery, and the Court charged the jury, "But if you are satisfied, from the evidence, that the deed from Mrs. Meyers to Willis Jones is a forgery, then the deed is a nullity as to all parties having notice of such forgery:"
Held, That this charge of the Court was error. *Cole et al. vs. Long*.... 579
14. Where a defendant in ejectment relies on seven years' adverse possession, under color of title, he can claim, under such title, only so much of the land as the largest description in his deed will embrace. *McKay et al., vs. Kendrick et al.*..... 607

15. If, at the time his grantor makes the deed to him, such grantor, by accident or design, points out more land than the largest description in the deed will embrace, and the defendant takes possession of the whole tract so pointed out, he is in, as to the overplus, only by the *pedis possessio*, and cannot set up prescriptive title as to that part unless he has so held it for twenty years. *Ibid.*
16. The lessor of the plaintiff can recover of a mere intruder upon prior possession alone. *Ibid.*
17. Where the lessor of the plaintiff is ejected, he cannot be said to have voluntarily abandoned, because he does not resume possession immediately on the land becoming vacant again, especially where the defendant's witnesses testify that no such vacancy ever occurred. *Ibid.*
18. Where A makes a deed to B for the purpose of defrauding the creditors of A, but retains possession of the land, and B brings ejectment, A may, by way of defense, set up the fraud under the rule, *in pari delicto potior est conditio possidentis*. *Harrison vs. Hatcher*. 658
19. In such a case, grantees holding under a deed of gift from B, expressed to be for \$5 00, and for love and affection, stand in the same condition as their grantor, and are volunteers. *Ibid.*
20. Declarations of one in possession of land, that the land is his, are admissible to show adverse possession, but not for any other purpose. *Ibid.*
21. When, in an action of ejectment, it appears that both parties claim title from the same person, it is not necessary to show title further back than to the common grantor. *Ibid.*
22. A trustee for a woman during her life, with directions to convey to her children at her death, may sustain an action against an adverse holder to recover the possession after the death of the mother. *Ibid.*
23. Where in ejectment plaintiff shews title from the State to himself, and defendant relies on adverse possession under color of title, it is competent for plaintiff to show, in rebuttal, infancy on the part of one of his grantors, even after the evidence has closed and argument commenced, if the existence of such fact then

come to his knowledge for the first time. *Evans et al., vs. Baird*..... 645

24. When a party claims adversely it is not necessary for him to shew that he went into possession *bona fide*. This will be presumed until the contrary appears. *Ibid*.

EQUITY JURISDICTION.

1. Where A. filed his bill in equity against B. and L., in which he alleged that B., as the agent of L., had sold to him certain guano, which was worthless, and fraud in the sale by the partner, and there was a demurrer to the bill for want of jurisdiction, on the ground that L., who was the owner of the guano, resided in a different county, and also for want of equity, and the Court sustained the demurrer :

Held, That the Court did not commit error in sustaining the demurrer, under the facts in this bill, upon both the grounds. Equity will not entertain jurisdiction over the principal by linking him with his agent or commission merchant, upon general allegations of fraud, or interest of commissions by such agent, out of the county of the residence of such principal. *Ellis et al. vs. Lamar et al.*..... 9

2. When a bill was filed to restrain the transfer of certain promissory notes, alleged to have been given for the purchase of a tract of land, the main inducement for the purchase thereof being the timber standing on the land at the time of the sale, which the vendor had previously sold to other parties, without the knowledge of the vendee, and the notes given for the land being due at different times :

Held, That a Court of equity had jurisdiction, under the allegations in the complainant's bill, to restrain, by injunction, the transfer of the notes by the vendor, which were not due at the time of the filing of the bill, until the final hearing of the cause, to prevent a multiplicity of suits, and to have the whole matter in controversy between the parties settled by the decree of the Court. *Zeigler et al. vs. Beasley*..... 56

3. The plaintiff in error in this case filed his answer, in which he set up, by way of cross-bill, that a certain sum of money found to be due by the auditor to par-



ties therein named, as daughters of the decedent, was correct as to the facts set out in such report, and admitted the trust and the rights of the parties, but alleged that such amount ought not to be paid, upon the ground that their husband's marital rights attached thereto, and that they had, by waste and mismanagement of the estate, rendered themselves liable for a larger amount to the estate, and the Court below dismissed the cross-bill upon motion:

Held, That the right, at any time before a final decree distributing the assets to file a bill setting up grounds of equity against the payment of certain debts, is recognized by this Court, and if the subject matter has been previously litigated or adjudicated before the Auditor, upon the facts, and by the Court, upon exceptions to his report, relative to the law, and the interlocutory judgment of the Court has confirmed the report, such facts must arise upon plea to the cross-bill, and it was error in the Court to dismiss the same upon motion. *Crutchfield et al. vs. Patten*..... 65

4. When, by mistake of a magistrate, in failing to mark the name of counsel to the defense of a suit pending in his Court, judgment was obtained against the defendant, and such defendant, under a mistake and ignorance of the facts, let the time elapse for appeals, and filed his bill, stating the facts of the mistake, and also that he was not liable for the debt sued, it being, as he alleges, a promise to pay the debt of another, under conditions, which is denied by the defendant to the bill, and upon hearing the evidence, the Court refused the injunction:

Held, That the Court erred, under the facts alleged in the bill. The judgment having been obtained by mistake, equity had jurisdiction, and the fact of the liability was a question for the jury, upon the evidence, and it was the duty of the Court to have restrained the levy under such judgment, until the hearing upon all the facts and evidence in the case. *Brown vs. Jones*..... 71

5. When a bill in equity was filed by Mrs. Worthy, alleging that she had purchased from Tate the premises in dispute, and having great confidence in him, had given him the deed and tax receipts thereto, at his request, which, on her request to return, he said he had

burned up, and the prayer of the bill was to cause said deed and tax receipts to be returned, and also to enjoin proceedings to eject her as the tenant of Tate, the former owner, under the provisions of the Code against tenants holding over. And she further presented her inability to give bond under the section of the Code requiring security with the counter-affidavit to arrest the proceedings under the warrant, etc., and the bill was demurred to and a motion made to dismiss it, upon the ground that there was a complete remedy at law, and for want of equity, which motion to dismiss was sustained by the Court:

Held, Under the facts presented by the bill, that this was error. There was equity in the bill, as against Tate, to cause the delivery of the deed and tax receipts, and the provision for defense by counter-affidavit and bond, under the 4007th section of the Code, was not ample and complete, and the facts developed such a condition of alleged fraud and trust as invoked the jurisdiction of equity. *Worthy vs. Tate*..... 152

6. Under an Act of the Legislature, a new county was organized, and the voters required by ballot, under the usual superintendents of such elections, to locate the county site, and in casting their ballots various places were designated, which the commissioners, appointed by the Legislature, together with the Ordinary elect, from their contiguity to each other and a common understanding among the people as to what was meant, held to be one and the same thing, and consolidated the various votes, which, by addition together, gave a majority over the centre of the county, which was also voted for; and such commissioners proceeded, under the Act, to lay out town lots and offer them for sale; and other citizens dissatisfied with their judgment, brought a bill of injunction to enjoin such commissioners, and the Court below granted the injunction upon the hearing of the various affidavits, *pro* and *con*, touching the premises. Several witnesses testified that these various place were not the same and a much larger number testified that they were:

Held, Under the facts in this case, that a Court of equity had jurisdiction at the instance of citizens of the county to enjoin the commissioners from doing what they alleged to be an illegal act, which resulted to their

- injury as tax-payers and property holders of the county. *Smith et al. vs. Magourich et al.*..... 163
7. A bill was filed, alleging that in 1868 the complainants had purchased of defendants a tract of land, described in the deed as containing three hundred and fifty acres, more or less, for \$5,000 00, half of which was paid in cash, and the balance secured by note and mortgage, of which there was still due \$1,250 00, and that proceedings were pending for the foreclosure of the mortgage; that the defendants had falsely and fraudulently represented said tract to contain three hundred and fifty acres, and complainants had bought the same on the faith of their said representations; that complainants had, by a recent survey, ascertained that the said tract did not contain more than two hundred and sixty-four acres. The bill further alleged that the defendants were insolvent, and prayed an injunction of the proceedings to foreclose—a cancellation of the deed to them—and the mortgage—a decree for the money they had paid, and that the land be declared subject to the decree:
- Held*, That, as there was no allegation in the bill to show that the prime quantity of three hundred and fifty acres of land was such an ingredient in the trade as could not be compensated by recouping the value of the deficiency against the amount still due, there was no ground for the rescinding the trade. And as the remedy at law by plea was complete for the deficiency, equity had no jurisdiction of the matter.
- Trammel vs. Marks.*..... 166
8. It was error to rule out evidence of the deficiency of the quantity of the land. Under section 2600 of the Code apportionment of the price as well when the purchase has been by *lot* as per acre may be had when deception or mistake amounting to fraud is proven, which is for the jury and not the Court to determine.
- James vs. Elliot.*..... 237
9. Where a summons of garnishment has been served on a defendant, and he can protect himself in a Court of law by filing his answer, stating the fact as to his indebtedness, a Court of equity will not interfere by granting an injunction to restrain the parties in the exercise of their legal remedies. *Carr vs. Lee, executor.*..... 376

10. When it appears from the bill that the complainant has a judgment at law for the amount of his debt, he has an adequate remedy by levy and sale of the property, and equity will not assume jurisdiction to enforce, by a decree, the collection of a judgment already obtained where the allegations set up the insolvency of the parties merely, as the process of the Court upon the judgment at law is the proper remedy ; and a demurrer to such bill on the grounds stated ought to have been sustained. *Lawson & Lawson vs. Grubb's administrator* 466
11. The fact of whether a contract was entered into by Whitfield with Spearman, to devise to him certain property, by will, is one for the jury to find upon the evidence, and if they found a contract existed, equity had jurisdiction to decree damages for the breach, although it was impossible to decree specific performance in terms of such contract. *Spearman vs. Wilson et al.*..... 473

See *Accord and Satisfaction*.

EQUITY PRACTICE.

1. Where there was a bill and answer and plea, and it was agreed that as there was no dispute as to the facts, the Judge should decide the case on the pleadings :
Held, That the facts set forth in the bill, answer and pleas are all to be taken by the Judge as true. *Walker et al. vs. Walker et al.*..... 142
2. Where, by consent of parties, a verdict was taken in an equity cause, for the complainant, the amount of the verdict to be left blank, and afterward, at the same term, a consent agreement was entered into by the parties, and put upon the minutes of the Court, reciting the fact of the verdict, and agreeing that the blank should be filled by the Judge, by proper order, after a hearing in vacation, and a decree was then taken by the complainants, leaving the amounts also in blank, and the hearing was had as agreed upon, and an order passed by the Judge directing the Clerk to fill the blanks in the verdict and decree, which was accordingly done:
Held, That under this state of facts, and after nearly three years have elapsed without any motion by the

defendant, it was not error in the Court below to refuse to sustain a bill of review to allow a new hearing on the sole ground of error of law, on the face of the proceedings. Whatever of defect there is in the record is cured by the consent of the parties. *Ibid.*

3. Equity may take jurisdiction by bill in the nature of a bill of peace, under section 3166 of the Code, and bring all the parties, plaintiffs and defendants, into the forum, and adjust their equities and several rights by one decretal verdict, and the inquiry upon the truth of such case to cover not only past but future damages, so as to stop all further litigation in or about the same subject matter, and operate as a complete investiture of the legal right, free from further claim of damages to the railroads in their use of Washington street, Augusta, for railroad purposes by steam power, within the legitimate scope of the legislative right granted to them upon their compliance with the verdict. *The So. Ca. R. R. Co., et al., vs. Steiner et al.*..... 546
4. Where a mill was erected in 1866, and used in the ordinary manner since, until 1871, and a bill is filed to enjoin the mill owner from allowing the ebb and flow of the water below the mill, caused by the usual stopping and opening of the gate, on the ground that it produces sickness in the neighborhood, with special damage to the plaintiff, and it appears, by affidavits, that there is much conflict of testimony, as to the fact of the damage, and as to the ebb and flow being the cause of the sickness, it is no abuse of the discretion of the Court if he refuse the injunction until the facts are passed upon by a jury. *Nelms vs. Clark & Morgan*..... 617

See *Injunctions*.

EVIDENCE.

1. Certain cotton receipts were given to Davidson, the testator, in his lifetime, by the defendant, subject to the demand of Davidson or his order, and on the back thereof was written, "Deliver to T. N. Johnson, or order. W. Davidson:"
Held, That this did not vest the title to the cotton in Johnson as against Davidson's legal representatives, but that it was competent to prove by Johnson that

- he was merely the agent of Davidson to receive the cotton and had no personal interest in it, and that the indorsement on the back of the receipt was made for that purpose only. *Lowery vs. Davidson et al.*..... 38
2. Where, on a trial for incestuous fornication of A with his sister, the sister was introduced as a witness, and on cross-examination she denied that one Powers, (her brother-in-law,) had sued the defendant in her name, and the Court permitted proof to be made that a suit was pending in her name by Powers as her next friend, but refused to permit the declaration and accompanying papers to be read to the jury:
Held, That this was not error, as the contents of the paper were not material to the issue, which was simply whether or not a suit had been brought by Powers in her name. *Powers vs. The State*..... 209
3. The sayings of one of the partners, not expressly or by implication brought to the knowledge of the other, are no evidence against that other, in an issue of partnership or no partnership. *Sankey & Shorter vs. The Columbus Iron Works*..... 228
4. Upon a trial for larceny of a horse, a bill of sale to the horse offered by the prisoner, without showing *aliunde* its *bona fide* execution was inadmissible as evidence, and the Court committed no error in ruling out the testimony. *Taylor vs. The State*..... 263
5. If, upon the dissolution of a law firm, one of two partners gets a note for his part of the fee, evidence of his agreement to be represented in the trial of the case is competent and material, and ought to have been submitted to the jury under the charge applicable. *Pool vs. Curry*..... 291
6. One's habits, temper, morality, sobriety, sense, or the contrary, should be ascertained when he applies for the guardianship of an idiot. (R.) *Johnson vs. Kelly*... 485
7. It was error in the Judge, upon the trial of the traverse of the sheriff's answer, to reject evidence of the fact that the defendant in *fi. fa.*, had property in his possession sufficient to satisfy the judgment, at the time of the return of *nulla bona* by such sheriff upon the execution. *Bell et al. vs. Thorpe*..... 509
8. On the trial of an action of ejectment, it was shown that a certain deed, purporting to be from the State's

grantee, was lost or destroyed, and the interrogatories of a witness were offered, who swore that he had seen the deed; that it, with the original grant, had been passed to him as part of the muniments of title, on his purchase of the land, about the years 1826–1830, from the brother-in-law of the assumed maker of it; that he did not remember the witnesses, and that he thought he had sent the deed to DeKalb county for record, though he could not say it was recorded. It was in proof by other witnesses that the original grant had been in possession of the supposed maker of this deed in 1826, and not afterwards, though it was stated by a witness that the grantee had said that the grant was burned with his house. It was also in proof that, soon after 1826, the supposed maker of the lost deed ceased to give in the land for taxes with his other lands which he had previously regularly done each year since the drawing. It was also in proof that both the maker and the grantee of the supposed deed were dead, and that the Court-house and records of DeKalb county had been destroyed by fire:

Held, That altogether, these circumstances were proper to go to the jury as evidence worthy of consideration to show the genuineness of the deed, and to justify a charge of the Court, treating them as evidence upon that point. *Payne vs. Ormond et al.*..... 514

9. Where, in an action for damages for an assault and battery by the defendant upon the plaintiff, the defendant was a witness and was examined in full upon the case, and during the trial a bill of indictment, with a plea of guilty, for the same beating, and a judgment affixing a fine of two hundred dollars was introduced by the defendant in mitigation of damages.

Whether the evidence was admissible is questionable.

(R.) *Owens vs. Sanders*..... 610

10. Parol evidence is not admissible to add a covenant to a deed. *Sawyer vs. Vores*..... 662

See *Interrogatories*.

EXECUTIONS.

1. An execution founded on award against administrators in their representative capacity, which has been made the judgment of the Court, must follow the award,

and can only issue against such administrators in their representative character, to be levied of the goods, etc., of their intestate. *Horne vs. Spivey*..... 616

2. If the execution, on such an award, is issued against the property of the intestate, and if none be found, then against the individual property of the administrators, it is a nullity, so far as it seeks to subject the individual property of the administrators to the payment of the debt, and if such property is levied on, upon affidavit of illegality, the facts not being controverted, the Court should sustain the affidavit of illegality. *Ibid.*

EXECUTORS.

See *Administrators and Executors*.

EXEMPTIONS. See *Homestead and Exemptions*.

FACTOR'S LIEN.

See *Distribution of Estates*, 6.

“ *Homestead and Exemptions*, 10.

FEEES.

See *Costs*.

“ *Distribution of Estates*, 1.

FIDUCIARIES. See *Bankruptcy*, 10.

FI. FAS. See *Executions*.

FORGERY. See *Ejectment*, 10, 13.

FORNICATION. See *Criminal Law*, 2, 12.

FRAUD.

See *Arbitration*, 3.

“ *Equity Jurisdiction*, 2, 5.

“ *Habeas Corpus*, 2.

GARNISHMENT.

1. When a suit was brought in a Justice's Court for an amount over \$50 00, and a summons of garnishment

issued to a debtor of the defendant requiring him to appear and answer on the day fixed for the trial of the original suit, and the garnishee failed to answer on that day :

Held, That, as by section 3228 of the Code, final judgment cannot go against the garnishee until a term subsequent to that at which he is required to answer. It is the duty of the magistrate to continue the proceedings against the garnishee, by formal entry on his docket, to a subsequent day, not less remote than the unnumber of days required by law for the service of the original summons against the defendant in the suit; and any judgment against the garnishee, before the day to which the case is so continued, is illegal. *Scott, Bondourant & Adams vs. Patrick et al.*..... 188

2. Where a summons of garnishment has been served on a defendant, and he can protect himself in a Court of law by filing his answer, stating the fact as to his indebtedness, a Court of equity will not interfere by granting an injunction to restrain the parties in the exercise of their legal remedies. *Carr vs. Lee, executor.* 376

3. When a garnishee had answered that he was not indebted to and had no effects of the defendant, and there was a traverse of his answer, and the plaintiff proved that the defendant had left with the garnishee a large box, for safe keeping only, the garnishee declined to be responsible for it, but permitting him to leave it in his store-house; that it was there at the time of the service of the garnishment, had been removed since, with the permission of the garnishee, by the defendant, and that it contained \$200 00 worth of goods :

Held, That a verdict for the plaintiff, for the value of the goods, was sustained by the evidence. *Loyless vs. Hodges Bros.*..... 647

GUARDIANS.

1. One's habits, temper, morality, sobriety, sense, or the contrary, should be ascertained when he applies for the guardianship of an idiot. (R.) *Johnson vs. Kelly* 485
2. In a contest for guardianship of the person of an idiot, a colored man, one applicant being a white per-

son, and the other an only sister and nearest of kin to the ward, the proof showed that both were unobjectionable, and the Court charged the jury "that other things being equal, relations were to be preferred:"

Held, That under the Code, section 1799, this charge did not, in its full meaning, present the provisions of law for the consideration of the jury. The language of the law is "the nearest of kin by blood if otherwise unobjectionable shall be preferred." The philosophy of the law is wise, and its administration ought to be enforced; for superior advantages of wealth or intelligence in a stranger cannot justly invoke the exercise of a discretion vested by law in the Ordinary, when the nearest of kin is unobjectionable, and override the declaration of the law in favor of such nearest of kin by blood. *Ibid*.

HABEAS CORPUS.

1. The Governor of this State granted an unconditional pardon to a party, who was afterwards arrested by the sheriff upon a bench warrant for the same offense pardoned by the Governor, and petitioned the Court for the writ of *habeas corpus*, and upon the hearing thereof the Court refused to receive the pardon as evidence in favor of the applicant.

Held, That this was manifest error by the Court. It is the duty of all Courts, sitting for purposes of *habeas corpus*, or otherwise, to receive, without further evidence of its verity, the pardon of the Governor under the Great Seal of the State. *Dominick vs. Bowdoin*.. 357

2. *Held*, again, That pardons obtained by fraud are void, and upon suggestion of fraud upon the trial of *habeas corpus*, it was the duty of the Judge presiding to have heard the evidence, and passed upon its merits, as to the facts in the particular case, and it was error in the Court to hold that this question could only be inquired of by the jury. *Ibid*.

HOLIDAY. See *Practice in Supreme Court*, 16.

HOMESTEAD AND EXEMPTION.

1. When a sheriff was notified in writing that an execution placed in his hands was founded on a debt which

was for the purchase-money of land claimed as a homestead, and, having failed to make the money, was ruled for the amount of the execution :

Held, That the sheriff was liable to be ruled for the value of the land he was notified to levy on and sell.

Baker vs. Bower..... .. 14

2. A and B entered into a contract of partnership, by which A was to furnish goods to B, who was to sell them, and, after the first cost of the goods were paid, the profits were to be equally divided; and, after B's death, A filed his bill against his widow and heirs, to recover the balance he claims due to him, and set up that, inasmuch as B, during the copartnership, had used funds arising therefrom in improvements, etc., on certain property, which the widow had set off as a homestead under the laws of the State, his debt had a lien thereon. A demurrer was filed to the bill, which was overruled by the Court :

Held, That the Court erred in overruling the demurrer, as the debt due by B in his lifetime to A constituted no lien on his property that would deprive the widow of her right to homestead as against his creditors therein, nor was the use of such funds, under the facts, within the exceptions in said Act, for money borrowed, labor done, or material furnished, etc., and that the claim of A against the estate of B was not of higher dignity or of more equitable consideration than other debts due by him, and that his remedy is complete at law, and the administrator on the estate of B is a necessary party to the enforcement of such ordinary debts against the estate. *Kilgo et al. vs. Vandyke*..... .. 61

3. When the United States Courts, under the Bankrupt Act of 1869, have acquired jurisdiction of the estate of a bankrupt, the State Courts lose jurisdiction of all claims against him, provable under the Bankrupt Act, except specific liens upon his property, and legal or equitable claims of title thereto; and the homestead and exemption provisions of the Constitution of 1868 do not create such a specific lien upon or title to his estate, in favor of his family as may be heard and adjudicated by the State Courts pending the proceedings in bankruptcy. *Woolfolk vs. Murray. Bryan vs. Sims*..... .. 133

4. Whether said claim is such a debt in favor of the family as may be proven before the Bankrupt Court, independently of the exemption granted by the Bankrupt law to the bankrupt, it is for that Court alone to decide. *Ibid.*
5. The case of *Fannie Lumpkin vs. Eason*, at this term, having been, by permission, expressly questioned and reviewed, is, after reconsideration, affirmed. *Ibid.*
6. Where a party levied a distress-warrant on property consisting of a lot of drugs, which had been exempted by the Ordinary under the law of personalty exemption, and it appeared the drugs exempted had been mixed with other drugs bought by the parties :
Held, That the privilege of exemption extends only to the articles exempted by the Ordinary, and they must be identified to release them from levy, and a lot of drugs in a store, mixed with other drugs, are liable to levy and sale, except as to such parts or articles as may be specifically claimed and identified. *Smith et al. vs. Turnley*..... 243
7. Where a homestead was claimed under the Act of 1868, by the wife of a husband, on his land, who had been adjudged a bankrupt :
Held, That the wife could not have a homestead on the land of her bankrupt husband, as against the assignee of the bankrupt, or those claiming title thereto under a sale made by the assignee of the bankrupt. *Lumpkin et al. vs. Eason*..... 339
8. Where a party petitioned the Court for a *mandamus nisi* against the sheriff to compel his levy of a *fi. fa.* placed in his hands upon a homestead of realty set apart under the law, upon the ground that the Act of 1868, so far as it prevented the levy of a *fi. fa.* on such property or a judgment *fi. fa.* in existence before the setting apart of such homestead, and granted a larger amount of exemption than existed under the law at the time of the contract, was unconstitutional and void, and the Court held the act valid, and refused the *mandamus* : *Held*, That this was not error in the Court, under the rulings of the Court affirming the constitutionality of the Act, and protecting the sheriff from rule on account of its provisions from his refusing to levy said *fi. fa.* McCay, Judge, dissenting. *Gunn vs. Barry*..... 351

9. It was the duty of the Court to have directed the sheriff, by order, to levy upon the property, that the parties may have an opportunity of testing, before the Courts, whether the homestead so set apart, is or is not subject to an execution by the Comptroller General against a defaulting tax collector. Warner, Judge, dissenting. *The State vs. Bradford, sheriff*.... 417
10. Where a factor makes advances to a planter, and takes a lien upon the growing crops, under Revised Code, section 1977, such advances are in the nature of purchase-money, and the lien is, therefore, superior to the wife's title, where the crop was set apart to her as personalty under the homestead laws, after it was made. *Tift vs. Newsom*..... 600
11. Where A bargained land to B, taking his notes for the purchase-money, giving his bond for titles, and afterwards indorsed one of the notes to C, who indorsed it to D, and B having paid some of the purchase-money, abandoned the land, and A having died, his administrator took possession of the land:
Held, That the indorser and minor children of A are entitled to a homestead in the land as against a judgment obtained by D on the indorsed note against B as principal, and A and C as indorsers. The equity of B, under his bond for titles, with some of the purchase-money paid, to pay the purchase-money and demand a title, does not, in such a case, make the lien of the judgment paramount to the homestead. *Faircloth vs. St. Johns*..... 603
12. If, at the time the sale of land by the sheriff, an application be pending for a homestead in favor of the family of the defendant, and notice thereof be given at the sale, the purchaser buys subject to the homestead. *Ibid*.
13. Parties who appear before the Ordinary to contest the granting of a homestead are concluded by the judgment upon all questions which it is necessary for the applicant to prove, and upon all questions which the statute provides the creditors may make, but they are not concluded upon the questions over which the Ordinary has no jurisdiction, unless it appears that they actually made such questions, and that they were in fact decided. *Harris vs. Colquit & Baggs*..... 663

HUSBAND AND WIFE.

When a wife, by consent of her husband, makes a contract for her own labor, in which contract it is agreed that she is, herself, to receive the compensation, she may, under our law, sue and recover in her own name.

Meriwether vs. Smith 541

See *Alimony*.

“ *Pawns*.

“ *Distribution of Estates*, 3.

“ *Equity Jurisdiction*, 3.

“ *Homestead and Exemptions*.

IDIOTS. See *Guardians*.

ILLEGALITY.

See *Relief*, 16.

“ *Res Adjudicata*, 1.

INCEST. See *Criminal Law*, 2.

INDICTMENT. See *Criminal Law*, 5, 6, 8, 9, 12.

INDORSERS.

1. Where an accommodation indorser on a note made prior to June, 1865, has been compelled, by judgment, since that time, to pay the same or any part thereof, and sues the maker, securities and prior indorser, to recover the amount so paid by him, he is not obliged to file the affidavit of the payment of the taxes required by the Relief Act of 1870. The debt to him did not exist until the payment of the judgment by him. *Ezzard vs. Worrill et al.*..... 629
2. A written contract for payment of specifics not containing operative words of transfer is assignable so as to vest the title in the assignee, who may sue on it in his own name, under Revised Code, section 2218. *Cochran vs. Strong*..... 636
3. A written assignment “for value received” indorsed on such an instrument, the instrument not being a promissory note or bill of exchange, does not make the assignor liable as indorser or guarantor of the instrument; hence he cannot be sued in the same action with the maker. *Ibid.*

4. Where such an instrument is assigned to A, who, in turn, assigns it to B, and, by some means, it again comes into the hands of A, he cannot sue on it in his own name for use of last assignee. *Ibid.*
5. Under the provisions of the Revised Code of this State, the indorsers of a bill or note, not to be negotiated at a chartered bank, are not entitled to notice of non-payment, or non-acceptance, to charge them as indorsers: Code, 2739. *Gilbert & Vason vs. Seymour, Johnson & Co.*..... 63
6. Where the payee of a note indorses it after maturity, and suit is brought by the indorsee against the makers and indorser, and the plea by the makers sets up usury, and the Judge held such plea by the makers did not affect the liability of the indorsers upon his contract of indorsement after maturity of the paper: *Held*, That this was not error. The contract of indorsement was a new and distinct contract, not affected by usury between the payee and makers in the hands of the indorsee without notice, and the indorser, in a suit against him by the indorsee, cannot set up his own illegal act in taking usury, to defeat a recovery against himself as indorser. *Frank et al. vs. Longstreet, Sedgwick & Co.*..... 179
7. On a note made to be negotiated at a chartered bank, but not so negotiated and held by the payee at its maturity, and indorsed with a waiver of demand and notice by the security, and after its maturity indorsed by the payee, under our law, under 2739th section of Code, such indorser after maturity, upon suit by the indorsee, is not discharged by failure of proof of "demand and notice," and it was not error in the Court to refuse a non-suit on this ground. *Ibid.*

INDORSEMENT EXPLAINED.

See *Principal and Agent*, 1.

INFANCY.

See *Ejectment*, 23.

“ *Guardians*.

“ *Relief*, 15, 26.

INJUNCTIONS.

1. Under the facts in this case, the question of location upon the part of the commissioners, being a question of disputed fact, we cannot say that the Judge violated the discretion vested in him by law in granting the injunction; and we, therefore, affirm the judgment, with the following modification and direction, to-wit: That the place selected by the Commissioners and located by them, shall remain as now located, as the place for the transaction of county business by the officers of said county, who may make such arrangements in connection with the Commissioners, for the holding of Courts at that place as may to them seem proper until the final hearing of this case. *Smith vs. Magourich*..... 163
2. Where a mill was erected in 1866, and used in the ordinary manner since, until 1871, and a bill is filed to enjoin the mill owner from allowing the ebb and flow of the water below the mill, caused by the usual stopping and opening of the gate, on the ground that it produces sickness in the neighborhood, with special damage to the plaintiff, and it appears, by affidavits, that there is much conflict of testimony, as to the fact of the damage, and as to the ebb and flow being the cause of the sickness, it is no abuse of the discretion of the Court if he refuse the injunction until the facts are passed upon by a jury. *Nelms vs. Clark & Morgan*..... 617
3. When a Judge of the Superior Court, in the exercise of his discretion, grants or refuses an injunction, this Court will not interfere, unless such discretion has been manifestly abused. *Thomas & Co. vs. Stokes*..... 631

INSANE PERSONS. See *Guardians*.

INSURANCE.

When a wife insured the life of her husband in 1859 with an agent of a New York Insurance Company, and paid the annual premiums promptly until 1862, but then failed to pay said premiums until March, 1865, when the husband died, after which, and after the close of the war, she tendered the unpaid premiums, and demanded payment of the sum insured, alleging

that she was prevented by the war and by Act of Congress from paying them year by year, on the day fixed in the policy:

Held, That the contract of the company for any future risk was dependent upon the payment of the annual premiums as they, severally, by the assessment, were to be paid, and the failure to pay, for whatever reason, could not be remedied by a tender of the premiums after the death of the person whose life was insured. *Dillard vs. The Manhattan Life Ins. Co.*..... 119

INTEREST.

See *Administrators and Executors*, 3.

INTEREST IN CAUSE. See *Arbitration*, 1.

INTERROGATORIES.

1. Objections to interrogatories on the ground that they are leading must be made when they are presented to the objector, to be crossed, and before they are executed. *Sankey & Shorter vs. The Columbus Iron Works.*..... 228
2. Where, in the crosses to a set of interrogatories, a witness was asked as to his course during the late war and whether he had not hired a substitute in the Confederate army, and was further asked whether he believed Jesus Christ to be the Saviour of the world, and the witness refused to answer the question:
Held, That, as there is nothing in the record to show that such questions were pertinent to any matter before the Court, it was error in the Judge to rule out the whole of the witness' answers on the ground that the cross-questions were not answered. *Donkle vs. Kohn*..... 266
3. A witness used a memorandum in answering interrogatories, which was not attached to his answers. During the trial the Judge refused to rule out his answer, only so far as they were connected with said memorandum. The defect was one of execution, and the ruling of the Judge was right. (R.) *The E. T. & Ga. R. R. Co. vs. Montgomery*..... 278

IRREGULARITY.

An irregularity in a second original is not fatal to the

suit if the party has had notice. (R.) *Frank et al. vs. Longstreet, Sedgwick & Co* 179

JUDGMENTS.

Where a verdict and judgment are had against two defendants, on a joint and several contract, and it appears that one was never served, the verdict and judgment are void, only as to the one not served; the other can take no advantage of the error. *Kitchens et al. vs. Hutchens* 620

JUDGMENTS—CONCLUSIVENESS OF.

See *Res Adjudicata*.

JURISDICTION OF JUDGES OF SUPERIOR COURTS AND OF SAID COURTS.

1. The jurisdiction of a Judge of the Superior Court is co-extensive with the limits of the State, and the Judge of one circuit may hold a Court in another circuit than that for which he was appointed. *Rutledge et al. vs. Bullock*..... 23
2. When the United States Courts, under the Bankrupt Act of 1869, have acquired jurisdiction of the estate of a bankrupt, the State Courts lose jurisdiction of all claims against him provable under the Bankrupt Act, except specific liens upon his property, and legal or equitable claims of title thereto; and the homestead and exemption provisions of the Constitution of 1868 do not create such a specific lien upon or title to his estate, in favor of his family as may be heard and adjudicated by the State Courts pending the proceedings in bankruptcy. *Wolfolk vs. Murray. Bryan vs. Sims*..... 133

JURISDICTION—PLEAS TO. See *Pleading*, 3, 4.

JURY.

1. Where, upon notice for a new trial, the Court granted the motion on the ground that the father of one of the parties, and guarantor who had been rejected as a witness upon the trial, had, in the Court room, near to the jury box, and within hearing of the jury,

talked to another person, who had been a witness on the other side, about the case, and saying, among other things, that if he had been permitted to testify, he would have explained the whole matter, etc., and such fact was unknown to counsel or parties until after the verdict :

- Held*, That in view of the necessity of preserving the purity of jury trials, where the Court below who presides at the trial, and whose opportunity of knowing the effect of subtle influences brought to bear upon the jury is better than ours, has granted a new trial under section 3667 of the Code, we will not interfere with his discretion, except in cases of its abuse. *Smith vs. Willingham* 200
2. Under our laws, a Judge has no right to carry a jury into a different county from that in which they are empaneled; and any threat to do so, in case they do not find a verdict, was coercion, and deprived the jury of that free, voluntary consideration of the case invoked by the law. *Spearman vs. Wilson et al.*..... 473

JUSTICES' COURTS—TERMS OF.

See *Garnishments*, 2.

JUSTICE OF THE PEACE.

- A Justice of the Peace may issue a distress-warrant for more than he can entertain a suit for. (R.) *Smith et al. vs. Turnley*..... 243

JUSTIFICATION. See *Pleading*, 2.

LABORER'S LIENS.

See *Distribution of Estates*, 7.

LACHES.

1. Parties are bound to take notice that Court may be held at the time and place fixed by law, though there may be no Judge for the circuit which embraces that place. (R.) *Rutledge vs. Bullock*..... 23
2. A motion to reinstate a case, made at a term subsequent to that at which the judgment of dismissal was had, stands on the footing of a motion for a new trial,

and requires the same excuses for a delay as is required in motions for new trial after the term has passed. *Austin vs. Markham*..... 161

See *Practice in Superior Courts*, 2, 4.

“ *Relief*, 19.

LANDLORD AND TENANT.

1. Whilst it is a general rule of law that a tenant cannot dispute the title of his landlord, yet, when the defendant offers to prove to the Court facts going to show that the defendant was not holding possession of the premises as the tenant of the plaintiff, but under parties having paramount title thereto, the Court should allow the evidence to be received in order to ascertain the truth of the case, and then instruct the jury as to the law of landlord and tenant applicable to the facts as proved in relation thereto. *Wilborn vs. Whitfield's executors*..... 51

2. When a bill in equity was filed by Mrs. Worthy, alleging that she had purchased from Tate the premises in dispute, and having great confidence in him, had given him the deed and tax receipts thereto, at his request, which, on her request to return, he said he had burned up, and the prayer of the bill was to cause said deed and tax receipts to be returned, and also to enjoin proceedings to eject her as the tenant of Tate, the former owner, under the provisions of the Code against tenants holding over. And she further presented her inability to give bond under the section of the Code requiring security with the counter-affidavit to arrest the proceedings under the warrant, etc., and the bill was demurred to and a motion made to dismiss it upon the ground that there was a complete remedy at law, and for want of equity, which motion to dismiss was sustained by the Court:

Held, Under the facts presented by the bill that this was error. There was equity in the bill as against Tate, to cause the delivery of the deed and tax receipts, and the provision for defense by counter-affidavit and bond under the 4007th section of the Code was not ample and complete, and the facts developed such a condition of alleged fraud and trust, as invoked the jurisdiction of equity. *Worthy vs. Tate*... 152

3. A Justice of the Peace may issue a distress-warrant for more than he can entertain suit for. (R.) *Smith et al. vs. Turnley* 243
4. When a party sublets to another under a contract that the sublessee is to pay the rent due, this is not such a claim for rent as by the landlord as may be enforced against the sublessee by the levy of a distress-warrant. *Ibid.*
5. A tenant cannot attorn to one who claims adversely to his landlord even to prevent an illegal eviction by the sheriff. *Donkle vs. Kohn*..... 266
6. When a landlord rents a store in a building which, in the upper stories, was rented out to other tenants, and a water-closet, in the upper part, to which all the tenants had access, by reasons of obstructions thrown in, overflowed and damaged the goods of the tenant in the store:
Held, That the landlord was liable for the damages accruing. The fact of the act being caused by the neglect or wantonness of other tenants, when the proof showed previous notice that the closet was in bad condition, by abuse of such tenants, to such landlord, the fact that it was in the premise at the time of the renting, and that the plaintiff had access to it, but did not use it, does not change the liability. It is the duty of the landlord to keep the premises free from the consequences arising ordinarily from the use of a water-closet, which becomes a private nuisance, when not properly used and attended to; and if the landlord fails, and from such cause damage ensues, he is liable. *Marshall vs. Cohen*..... 894

LEVY—DISMISSAL OF. See *Liens*.

LIBEL. See *Slander*.

LIENS OF JUDGMENTS.

When a sheriff, by direction of the plaintiff, levied a distress-warrant for rent upon the crop made on the land rented and also on certain mules belonging to defendant on the place, and afterwards dismissed the levy on the mules, it appearing that they were un-

der a mortgage of superior lien to the distress-warrant, and the mules were run off by the defendant:
Held, That such levy and dismissal did not postpone the lien of the distress-warrant on the crop to younger liens. *Ketchum & Hartridge vs. Pace*..... 654

See *Distribution of Estates*.

“ *Dower*.

“ *Homestead and Exemption*, 2, 3, 10, 11.

LIMITATIONS OF ACTIONS.

The 7th section of the Act of 1869, limiting the time of actions for torts committed, applies only to such torts as were committed prior to the 1st June, 1865, and not to torts committed since that date. *Baker et al. vs. Roath et al.*

AS TO LAND.—See *Ejectment*, 5, 8, 9, 11, 12, 14, 15, 16, 23, 24.

LIQUIDATED DAMAGES.

See *Measure of Damages*, 3, 9.

MEASURE OF DAMAGES.

1. The sheriff was liable to be ruled for the value of the land he was notified to levy on and sell, that being the extent of the injury which the plaintiff sustained by the failure of the sheriff to perform his legal duty. *Baker vs. Bower*..... 14
1. If the evidence is confined to an agreed price for goods sold, it is not error in the Court to confine the jury to the agreed price as the measure of damages. (R.)
Woddail vs. Austin & Holliday..... 18
3. Where A agreed with B to deliver one hundred bales of cotton, at twenty-one cents per pound, to him, at any time within sixty days, and B knew that A expected to purchase himself to fulfil his contract, and the contract was reduced to writing, and recited that it was for value received, and the parties further agreed to put up \$1,000 each, which they did, to cover the losses of such contract:
Held, That, inasmuch as the original contract was reduced to writing, and recited a consideration, we hold there was sufficient, under the facts, to take the contract out of the illegality of such contracts under sec-

tion 2596 of the Code, and that the \$1,000 put up were to be regarded as stipulated damages, and the plaintiff could recover no more than that amount.

Swift, Hamberger & Co. vs. Powell..... 123

4. That the defendant acquired by his purchase every right of the pawnee, and was entitled to reduce the damages by the amount of money due the pawnee, since, if the husband had authority to raise the money as the agent of the wife, her damages from the conversion was the value of the watch less the money advanced thereon by the agent. *Van Arsdale vs. Joiner*.. 173
5. As there was evidence *pro* and *con* as to the authority of husband to pledge the watch, it was the right of defendant to have the law charged to the jury in both aspects of the case, and as the Court charged the jury that the measure of damages was the value of the watch in any event, this was error and the Judge erred in granting a new trial. *Ibid*.
6. When, upon the trial of a bill filed to restrain the collection of notes given for the purchase-money of land, both cases, the common law suit and bill being filed together, it was charged that, by the misrepresentation and fraud of the vendor as to the boundary of the land, the vendee made the purchase, and by such fraud he had been mislead into expenses in preparation so far as making brick, for which purpose he bought the land, and which was known to the vendor at the time of the sale, and the Court rejected the evidence offered by the complainant, the vendee, to show his damages resulting from the alleged fraud, and also as to the quality of the land:
Held, That this ruling by the Court was error. Under our law, fraud with injury gives a right of action—Code, 2906, 2907—and he may recover the damages, whatever the jury may allow in an action against him for the purchase-money, the rule of estimating damages being confined to his actual damage which he has suffered by the fraud of the party, the fact of fraud being for the jury to determine. *James vs. Elliott*.... 237
7. Under the facts of this case, if the jury found there was a contract, and a breach in the estimation of damages, it is proper to consider any advances made during the lifetime of Whitfield, distinguishing between

- voluntary gifts, not referential to the contract, but independent of it. *Spearman vs. Wilson*..... 483
8. The altered condition of the parties, arising out of the losses to the estate of Whitfield, at his death, is a proper subject matter to be considered by the jury, in case they found a contract to have been entered into, and such breach as entitled Spearman to damages, under the rules of the law. *Ibid.*
9. When there was a written agreement that one party would furnish and the other take all the crude turpentine made on a certain plantation when delivered in lots of forty barrels and pay for the lots on delivery, and if either party failed he should forfeit \$1,000 00: *Held*, That the \$1,000 00 is to be considered a penalty and not liquidated damages, and on a failure of either party the actual damage is all that can be recovered. *Lee, Wyly & Co. vs. Overstreet's administrator*..... 507

MILLDAM. See *Nuisance*.

MISREPRESENTATION.

See *Equity Jurisdiction*, 7, 8.

MISTAKE.

See *Arbitration*, 3.

“ *Ejectment*, 15.

“ *Equity Jurisdiction*, 4.

“ *Pleading*, 1.

MORTGAGE.

See *Distribution of Estates*, 3, 4.

“ *Dower*, 1.

MUNICIPAL CORPORATIONS.

1. The Christian Sabbath is a civil institution older than our government, and respected as a day of rest by our Constitution; and the regulation of its observance as a civil institution, is within the power of the Legislature, as much as any regulations and laws having for their object the preservation of good morals, and the peace and good order of society: 33 Barbour, 543; 1 Speers, 305. And it is within the right of the city of Atlanta to punish keeping open doors by dealers

- generally, in the limits of the city upon Sunday, for the purpose of *preventing* the violation of the State laws, as well as preserving the public respect for the Lord's day. *Kerwisch vs. The M. and C., of Atlanta.* 204
2. Where a public office is created by the authorities of a municipal corporation :
- Held*, That an incumbent of the office does not have such an interest in the salary as that the corporation cannot, at its discretion, abolish the office, and by so doing deprive him of his right to tender his services and demand his salary, for the full time for which he was elected. *The City Council of Augusta vs. Sweeny*..... 463
3. A mere project, or plat of land upon paper, laying off streets, blocks and houses in a city, is not itself a dedication of the streets to public use, and when there is a proposition to the city authorities to receive and adopt said streets as public streets, the dedication is not complete unless the authorities affirmatively receive and adopt the same, and this must appear by the minutes of the Council. *Parsons vs. The Trustees Atlanta University*..... 529
4. The City Council of Atlanta, in laying out or receiving public streets, acts as a Court, and its proceedings can only be proven by its records; parol evidence of its action cannot be received. *Ibid.*
5. In the absence of any formal acceptance by the public authorities of a street there must be clear proof of a continuous and notorious use for a reasonable time by the public to constitute an acceptance. *Ibid.*
6. Where there is a controversy pending between the public authorities and a citizen as to the existence or non-existence of a public street, and the public authorities are temporarily enjoined from opening the same by bill, it is not competent for private citizens, as such, to file a new bill pending the other, to enjoin the obstruction of the streets, unless they show some special damage to themselves from said obstruction different from the injury to the public. *Ibid.*
7. The act of the municipal authorities, sanctioned by the Legislature, gives to the railroad companies the right to use the streets in controversy. But the failure by the Legislature to provide for the assessment of damages by way of compensation to the property

owners on said street, does not take away the right of the party to his suit at law for damages under section 2692 of the Code. *The So. Ca. R. R. Co. et al. vs. Steiner et al.*..... 546

8. While the use of a public street may be granted to railroads to lay bars of iron on to run over with trains, without endangering the street by obstructions or embankments, yet if the use of locomotives inflicts injury upon those who live on the street, by throwing smoke through the houses along the streets, or by its weight shaking them or breaking the plastering or walls, etc., and by the noise and screeching of whistles and engines, the legislative right to run over the street does not make such acts harmless, and the injury inflicted upon the legal rights of the parties is not *damnum absque injuria*. Upon the trial, the rule of evidence should be limited to actual damage. The right to use the street with reasonable obstruction in the passage of trains is permitted by law, and is not an element of damage, nor is the jolting over the iron rail an element, nor the apprehension of the safety of children, nor are possibilities in cases of sickness, nor any inconvenience to visitors, nor obstructing ingress or egress, nor any fanciful or speculative damages, or sentimental injuries elements of damage. But the damage which the law recognizes must be actual, tangible and determinable by proof. And the depreciation of the property not only from obstructions to access, but by smoke and injury to walls, etc., and traceable as effect from cause and the like may be inquired into to form the total of the injury. *Ibid.*

NEGLIGENCE.

Where A, who was the owner of a storehouse and lot in the city of Rome, left at the rear of such storehouse, an excavation walled up for the purpose of giving light to the cellar of such storehouse, and B, who, on an alarm of fire, went down to the storehouse adjoining the house in which the fire was, and entering at the front door, went through the store, and going through the back door turned off the gangway, across the opening, and fell in and was injured:

Held, That the digging of an open space in the rear of the storehouse by A upon his own ground was a law-

ful act by him, and he had the right to keep it there as an appurtenant right for the use of his property, and B falling in by accident, the same not being near to a public street or crossing, gave no right to recover damages from A as a wrongdoer in the premises, and B going there on account of the fire did not change the rule. *Kohn vs. Lovett*..... 251

NEW TRIAL.

1. When the evidence is conflicting, and there is sufficient evidence to support the verdict, and no error in the charge of the Court which might probably have produced a different result, this Court will not interfere with the discretion of the Court below in refusing to grant a new trial, on the ground that the verdict is contrary to the evidence. *Woddail vs. Austin & Holiday*..... 18
2. When the evidence is conflicting, and there is sufficient evidence to sustain the verdict, and there is no material error in the charge of the Court, which might have probably produced a different result, a new trial will not be granted. *Leaptrot vs. Robertson*..... 46
3. When the evidence is conflicting, and no rule of law violated in submitting the facts to the jury, which probably might have produced a different result, a new trial will not be granted, on the ground that the verdict is contrary to the evidence, the more especially when the presiding Judge is satisfied with the verdict. *Dart, Jr., vs. Dupree*..... 55
4. The verdict of the jury was sustained by the evidence, and no rule of law being violated in submitting the case, it was error in the Court below to grant a new trial. *Murray vs. Walker*..... 58
5. When the Court, upon the trial, from a misconception of the law of the case, misdirected the jury, and admitted illegal evidence of consequential damages, but upon motion granted a new trial:
Held, That it was not error in the Court to have granted the new trial, especially as the verdict was for an amount not authorized by law. *Swift, Hamberger & Co. vs. Powell*..... 123
6. There was no request by either side that the Judge should charge as to the effect of A's retaining posses-

sion of the notes he held against the person whom it was claimed had made the transfer. The jury found against the transfer, and in favor of the off-set. On a motion for a new trial, on the ground that the jury found contrary to the evidence, and on several other grounds, the Court overruled the motion on all the grounds taken, but granted a new trial on the ground that he had erred in not charging the jury that the retaining possession of the notes, by A, was not conclusive against the transfer if, from the evidence, the jury should believe a transfer was *bona fide* made:

Held, That this was error as, in substance, such charge had really been given, at least, so far as it was proper for the Court to direct the jury as to the weight of the evidence. *Tommey & Stewart vs. Ellis*..... 139

7. A motion to reinstate a case, made at a term subsequent to that at which the judgment of dismissal was had, stands on the footing of a motion for a new trial, and requires the same excuses for a delay as is required in motions for new trial after the term has passed. *Austin vs. Markham*..... 161

8. When a written request was made by the defendant's counsel to the Judge to charge the jury, which request covered the whole case, and the Judge, in his charge, failed to follow the language of the request, but charged the law properly upon the points made, and upon the whole case, and the defendant was found guilty:

Held, The section 3664 of the Code, providing that a new trial *may* be *granted* on the refusal of the Judge to charge a pertinent charge in the language requested in writing, is not mandatory, but permissive only; and when the Judge has, in fact, charged the language correctly on the points covered, and upon the whole case, and has refused a new trial, this Court will not, for this reason only, grant a new trial. *Powers vs. The State* 209

9. In this case, while we are not entirely satisfied with the verdict, yet, as the case turns mainly upon the credibility of the witnesses—a matter specially within the province of the jury—and as the Court below has refused a new trial, we do not think it our duty to interfere with his judgment. *Ibid.*

10. When a question of fact has been fully submitted to a jury, who have found a verdict, and the Judge below refuses a new trial, this Court will not reverse the judgment, unless there be a very strong case against the verdict. *Cruger vs. Clark*..... 224
11. In a doubtful case, where the law was not presented fairly, in view of the evidence, a new trial may be granted. (R.) *Sankey & Shorter vs. The Columbus Iron Works*..... 228
12. The verdict of the jury in this case exceeded the amount proved to be due for rent, and we direct that the plaintiff write off the excess of the verdict over the rent due for the actual occupancy, or in default thereof, that a new trial be granted. *Smith vs. Turnley*..... 243
13. The verdict in this case is supported by the evidence, and the Court below having refused a new trial, this Court will not reverse the judgment. *Willingham et al. vs. Noyes*..... 248
14. When the charge of the Court and refusal to charge, misconceived the law of the case, and the Court refused a new trial:
Held, That this was error. *Kohn vs. Lovett*..... 257
15. Where, during the term at which a case was tried, a consent order was taken, giving the losing party thirty days after the final adjournment of Court within which to make a motion for a new trial and file the brief of testimony, which time was subsequently, by another order, passed by the Judge, also by consent, extended to the day of December, and the parties failed to agree to the testimony until the last day of December, and the Judge being then absent from home, the brief, though presented to him, was not approved on that day by him:
Held, That it was not error in the Judge, on being satisfied that the delay was not the fault of the movant, subsequently to approve the brief of testimony and permit it to be filed, and grant the rule *nisi* to be heard at the next term of the Court. *Donkle vs. Kohn*..... 266
16. As there is sufficient evidence in this case to sustain the verdict, and as the newly discovered evidence is only cumulative, and would not, necessarily, change

- the verdict, there was no error in refusing a new trial.
Moore vs. Ewings et al..... 354
17. Newly discovered testimony is only a ground for a new trial, when, if it were heard by the jury, it must, with considerable certainty, control the verdict. *Ibid.*
18. Where the evidence in the case is all presumptive and the jury have found a verdict of guilty, this Court will grant a new trial upon the ground of the absence of witnesses with greater liberality than in a case where the guilt of the accused is manifest by the proof. *Worthy vs. The State.* 449
19. Upon the whole case, we think there was no error in the judgment refusing a new trial. *Pool vs. Perdue*..... 454
20. A new trial will not be granted because a witness swore on the trial to a fact wholly unexpected to the plaintiff, who, at the time, knew the statement was false, and that he could so prove by a witness whose testimony he could have procured had he thought such proof was necessary. The party surprised by the statement of the witness, should have moved for a continuance. He cannot take his chances of a verdict and then claim a surprise. *Beckford & Holman vs. Chipman*..... 543
21. When a motion was made to set aside a verdict on the ground that the defendant—the losing party—was prevented from attending the trial by serious sickness: *Held*, That in such a case it is not necessary to file a brief of the testimony given at the trial, and it may be error in the Court to refuse the motion for that reason. *Audulph vs. Josey*..... 605
22. A new trial will not be granted only because a verdict is too small in trespass *vi et armis*, unless it is shockingly against the evidence. (R.) *Owens vs. Sanders*..... 610
23. The verdict in this case was not contrary to equity and justice, nor to the evidence. *Kitchens et al. vs. Hutchins*..... 620
24. Where written requests to charge the jury are presented to the Judge, which are pertinent and legal charges in the case, as presented by the facts in evidence, and on material issues, which are refused by

the Judge, a new trial ought to be granted, even if the verdict of the jury may be sustained, under the evidence, upon other issues in the case not covered by the requests to charge. *Harrison vs. Hatcher*..... 638

NEXT OF KIN. See *Guardians*.

NON-SUIT. See *Bankruptcy*.

NOTICE.

See *Alimony*, 3, 4.

“ *Certiorari*, 1, 2, 3.

“ *Ejectment*, 13.

“ *Homestead and Exemptions*, 12.

“ *Irregularities*.

“ *Indorsers*, 5.

NOTARY PUBLIC. See *Constitutional Law*, 19.

NOVATION.

1. When, in 1863, A sold to B two negro slaves for \$5,000 00, payable in pork at \$1 00 per pound, and in cotton at fifty cents per pound, but no note was taken, and soon after \$2,000 00 was paid in pork according to the contract, and afterwards, A having died, his executors, after the 1st June, 1865, adjusted the debt with B, fixing the amount due at \$1,700 00, part of which was then paid, and B's note, with C as security, taken for the balance:

Held, That this was not a mere renewal of the old debt, so as to bring it within the Relief Acts of 1868 or 1870. But as there was, in fact, no new consideration, and the party introduced was only a security, the note was still for slaves, and it was error in the Court to charge the jury that there had been such a novation as to purge the debt of its slave consideration. *Collins et al. vs. Collins et al.*..... 128

2. When, on the motion to set aside a judgment made in the case, it appears that the note was given in settlement and consideration of a claim held, and a judgment transferred upon a third party, and was not within the provisions of the Act of 1870, while we hold the Court erred in dismissing the plea, still, by

the facts, when it appears no injury was done to the defendant, and the facts set up sufficient to show the judgment would not be changed by a new trial and reversal, a new trial will be refused. *Welborn vs. Akin*..... 420

NUISANCE.

1. Where a mill was erected in 1866, and used in the ordinary manner since, until 1871, and a bill is filed to enjoin the mill owner from allowing the ebb and flow of the water below the mill, caused by the usual stopping and opening of the gate, on the ground that it produces sickness in the neighborhood, with special damage to the plaintiff, and it appears, by affidavits, that there is much conflict of testimony as to the fact of the damage, and as to the ebb and flow being the cause of the sickness, it is no abuse of the discretion of the Court if he refuse the injunction until the facts are passed upon by the jury: *Nelms vs. Clark & Morgan* 617

2. Where a landlord rents a store in a building which, in the upper stories, was rented out to other tenants, and a water-closet, in the upper part, to which all the tenants had access, by reasons of obstructions thrown in, overflowed and damaged the goods of the tenant in the store:

Held, That the landlord was liable for the damages accruing. The fact of the act being caused by the neglect or wantonness of other tenants, when the proof showed previous notice that the closet was in bad condition, by abuse of such tenants to such landlord, the fact that it was in the premise at the time of the renting, and that the plaintiff had access to it, but did not use it, does not change the liability. It is the duty of the landlord to keep the premises free from the consequences arising ordinarily from the use of a water-closet, which becomes a private nuisance, when not properly used and attended to; and if the landlord fails, and from such cause damage ensues, he is liable. *Marshall vs. Cohen*..... 489

See *Municipal Corporations*, 8.

OFFICERS.

1. One holding a commission from the Governor as Notary Public and *ex officio* Justice of the Peace, and acting as such, is a *de facto* officer, and his official acts cannot be attacked collaterally by the parties to a suit, on the ground that his appointment was not authorized by law. *Pool vs. Perdue*..... 454
2. Where a public office is created by the authorities of a municipal corporation:
Held, That an incumbent of the office does not have such an interest in the salary as that the corporation cannot, at its discretion, abolish the office and, by so doing, deprive him of his right to tender his services and demand his salary, for the full time for which he was elected. *The City Council of Augusta vs. Sweeney*. 463
3. General Terry did not, by his removal of Wetmore, as the Ordinary of Chatham county, and appointment of Stone thereto, convey such a title to the office as, upon the application of Stone to the civil Courts, they could enforce under the Constitution and laws of this State. *Stone vs. Wetmore*..... 495
4. The facts recited in the petition for *quo warranto*, to-wit: that Stone, after the removal of Wetmore by General Terry, was appointed to the office, and filed his bond and was commissioned by the Governor, did not confer such a right to the office as Courts can recognize. The commission did not convey more than the order of appointment upon which it was based, and that appointment expired with the powers that gave it existence. *Ibid*.
5. Appointments, under the Reconstruction Acts of Congress, to civil office by the General Commanding, was not by virtue of the Constitution of the State, but by the power of the Acts of Congress, and did not confer upon the incumbents any title to the same longer than the Acts themselves were of force. *Ibid*.
6. In a proceeding by an incoming officer, who had been commissioned and sworn, against his predecessor, to compel the turning over of the books, papers, etc., of the office, as provided by sections 162, 163, 164, 165 of the Code, the Courts will not go behind the commission to inquire into the legality of the election, or the eligibility of the new officer. *Ross vs. Williamson*. 501

7. The simple fact that an officer elect does not give his bond and take the oath of office within the time prescribed by law, is not sufficient to work a forfeiture of his right to the office; it must appear that the not giving the bond and taking the oath within the time, was by the fault or failure of the officer. *Ibid.*
 8. A Solicitor General, elected in 1867, is estopped from claiming compensation, under a law passed in 1857, but repealed in 1866. *Smith vs. The Ordinary of Chatham*..... 504
- See *Constitutional Law*, 2–8, inclusive.

OPINIONS—POLITICAL AND RELIGIOUS.

See *Interrogatories*, 2.

OVERSEER'S WAGES.

See *Distribution of Estates*, 7.

PARDONS.

1. The Governor of this State granted an unconditional pardon to a party, who was afterwards arrested by the sheriff upon a bench warrant for the same offense pardoned by the Governor, and petitioned the Court for the writ of *habeas corpus*, and upon the hearing thereof, the Court refused to receive the pardon as evidence in favor of the applicant:
Held, That this was manifest error by the Court. It is the duty of all Courts, sitting for purposes of *habeas corpus*, or otherwise, to receive, without further evidence of its verity, the pardon of the Governor under the Great Seal of the State. *Dominick vs. Bowdoin*... 357
2. *Held, again*, That under the Constitution of 1868, which differs from the previous Constitutions of this State, in the grant of the power of pardon to the Executive, and contains only the same limitation upon the power that limits the royal prerogative in Great Britain, by Act of William the Third, which is incorporated into the Constitution of the United States, and by the Courts in Great Britain, and the Supreme Court of the United States, has been held, to authorize the exercise of the pardoning power *before* as well as *after* conviction, and it was error in the Court to reject this pardon upon that ground. *Ibid.*

3. *Held, again*, That pardons obtained by fraud are void, and upon suggestion of fraud upon the trial of *habeas corpus*, it was the duty of the Judge presiding to have heard the evidence, and passed upon its merits, as to the facts in the particular case, and it was error in the Court to hold that this question could only be inquired of by the jury. *Ibid.*
4. Where the pardon of the Governor was pleaded by the sureties in discharge of their bond for the appearance of their principal, and the recital of facts in the pardon showed that it was not applied for by the accused, who was out of the State, and the plea failed to show *its delivery to him and acceptance by him*, and the Court sustained a demurrer to the plea:
Held, Under the facts, there was not error. Assuming that, under the Constitution of 1868, the Governor may exercise the pardoning power *before* conviction, (see decision of this Court in *Dominick vs. Jailor of Spalding county*, and 29 Missouri, 300,) yet pardons *before conviction* are based upon the confession of the imputed guilt by the accused, and before such pardon takes effect it must be accepted by the accused, and when the plea of pardon by sureties fails to set up its acceptance by their principal, evidenced by his application for the pardon and delivery to him or his acceptance of it when done, the pardon, granted without the application of the principal and not evinced by his acceptance of it, is of no effect. See concurring opinions. *Grubb et al. vs. Bullock, Governor*..... 379

PARI DELICTO. See *Ejectment*, 18.

PAROL EVIDENCE—TO EXPLAIN WRITTEN.

See *Evidence*, 1, 5, 8, 11.

“ *Principal and Agent*, 1.

PARTIES.

See *Attachment*, 1.

“ *Ejectment*, 2.

PARTNERSHIP.

1. Where, on the trial of an issue of partnership or no partnership, one witness swore that the capital stock,

to-wit: a steam saw mill, was furnished by one, and the hands to run it by another, who was also to superintend the work, and that the profits were to be divided equally between the two; and another witness swore that the mill, fixtures and hands were furnished by one, and that the other was employed by the first as superintendent only, that he had no interest jointly with the first in the profits and losses, but was to receive one-half the net profits for his services, and had only a common interest in the profits:

Held, That under section 1880 of the Revised Code, by the testimony of the first witness there was, as to third persons, a partnership, since the hands furnished a part of the capital stock, and the partners had a part interest in the result; but that, by the testimony of the second witness, no copartnership, even as to third persons, arises from the simple fact that one is to receive half the profits for his services; such an one has no joint interest in the profits and losses, but only a common interest in the profits, and it is error in the Court to charge this as the law to the jury, if they should believe the second witness. *Sankey & Shorter vs. Columbus Iron Works*..... 228

2. Whatever may be the interest of the parties, and whether they be, in fact, partners under the bargain or not, they will be liable, as such, if they so act as to hold themselves out to the world as such. *Ibid*.

3. Partnership or no partnership is a fact, and a witness may so state, but the fact so stated may be qualified and explained by other facts in evidence, either from the witness or from other testimony. *Ibid*.

4. The sayings of one of the partners, not expressly or by implication, brought to the knowledge of the other, are no evidence against that other, in an issue of partnership or no partnership. *Ibid*.

5. If, upon the dissolution of a law firm, one of two partners gets a note for his part of the fee, evidence of his agreement to be represented in the trial of the case is competent and material, and ought to have been submitted to the jury under the charge applicable. *Pool vs. Curry*..... 291

6. In this State, one partner may sue another at law, and if he is able to show the affairs of the concern so

settled, as the jury can ascertain what is justly due him, he may recover. *Pool vs. Perdue*..... 454

PARTY AS WITNESS.

1. When an executor or administrator is a party in any suit on a contract of his testator, or intestate, the *other party* shall not be admitted to testify in his own favor. *Leaptrot vs. Robertson*..... 46
2. The defendant, Wilborn, was properly rejected as a witness, the other party being dead. *Wilborn vs. Whitfield's executors*..... 51
3. On the trial of an issue joined to ascertain whether the defendant was in possession of the land for which the note, the foundation of the action, was given, at the commencement of the suit, the death of one of the parties to the note, the survivor being the one to whom the deed was made, did not exclude the plaintiff as a witness from testifying, and it was error in the Court to reject his evidence. *Rawson vs. Cherry*..... 73

PASTURAGE. See *Common of Pasturage*.

PAWNS.

1. The title of the plaintiff was not divested by the sale without the notice, etc., required by the Code. *Van Arsdale vs. Joiner*..... 173
2. The plaintiff could recover without paying or offering to pay the money borrowed, even if the husband had authority to raise money by pledging the watch of his wife, as the sale was a conversion. *Ibid.*

PENALTY. See *Measure of Damages*, 9.

PISTOLS. See *Criminal Law*, 4.

PLEADING.

1. When a defendant, in a Court of law, seeks to avoid his contract on the ground of *mistake*, he must, by his pleadings, allege the grounds of the mistake as fully as he is required to do in a Court of equity to entitle him to relief. *Lowery vs. Davidson et al.*..... 38
2. It was error in the Court to have charged the jury that they could not consider the fact of justification,

under the plea of the general issue. By the Code, section 3406, and the rulings of this Court in 9 Georgia Reports, 297, and 12 Georgia Reports, 463, such facts of justification must have been specially pleaded.

Kerwich vs. Steelman..... 197

3. The Act of 1869, authorizing attorneys to make oath to setting up issuable defenses to suits founded on contract, does not alter sections 3410 and 3412 of the Code, requiring pleas to the jurisdiction to be pleaded in person, and to be sworn to by the defendant. *Colquitt vs. Mercer & DeGraffenreid*..... 432

4. A plea to the jurisdiction may be filed at any time before the defendant has appeared and pleaded to the merits, and if he has filed a plea to the jurisdiction at the first term, which has been stricken because not sworn to, he may, if he has filed no plea to the merits, still file his plea to the jurisdiction. See LOCHRANE, Chief Justice, concurring. *Ibid.*

PRACTICE IN SUPERIOR COURTS.

1. If irrelevant evidence be introduced without objection, the Court may not charge the jury to disregard it. The party wishing to have it disregarded, should move to rule out such evidence. (R.) *Woddail vs. Austin & Holliday*..... 18

2. Where, in an action for damages for an assault and battery by the defendant upon the plaintiff, the defendant was a witness and was examined in full upon the case, and during the trial a bill of indictment, with a plea of guilty, for the same beating, and a judgment affixing a fine of two hundred dollars was introduced by the defendant in mitigation of damages—and after the evidence was closed, and the argument of the counsel on both sides to the jury concluded, the Court permitted the defendant to be re-introduced for the purpose of stating facts calculated to show that he had pleaded guilty under a mistaken impression derived from the Solicitor General, that it would be cheaper to plead guilty than to attempt to defend, and that the fine would be very small:

Held, That if no reason was shown why this evidence was not offered before the case was closed and the argument heard, the admission of it, at the time, was

- not fair to the plaintiff, and a new trial ought to be granted. *Owens vs. Sanders*..... 610
3. If a discharge in bankruptcy be pleaded, the Court cannot dismiss the cause on that ground, but must submit the issue to a jury. (R.) *Austin vs. Markham*..... 161
4. Where, in ejectment, plaintiff shews title from the State to himself, and defendant relies on adverse possession, under color of title, it is competent for plaintiff to show, in rebuttal, infancy on the part of one of his grantors, even after the evidence has closed and argument commenced, if the existence of such fact then come to his knowledge for the first time. *Evans et al. vs. Baird*..... 645
5. Pardons obtained by fraud are void, and upon suggestion of fraud upon the trial of *habeas corpus*, it was the duty of the Judge presiding to have heard the evidence, and passed upon its merits as to the facts in the particular case, and it was error in the Court to hold that this question could only be inquired of by the jury. *Dominick vs. Bowdoin*..... 357
6. Upon the call of a case upon the docket, the counsel for the plaintiff stated to the Court that he had a motion prepared to transfer the case to the United States Court, and the Court refused to hear the motion, giving precedence to a motion to dismiss the case upon the ground of non-payment of taxes, under the Act of 1870. This was error. *Bragg et al. vs. Tibbs*.... 294
- See *Charge of Court*.

PRACTICE IN SUPREME COURT.

1. There will be no reversal of a judgment, if it was right, upon any ground apparent from the record. (R.) *Glenn & Son vs. Shearer*..... 16
2. It is a sufficient assignment of errors to recite the facts upon which *certiorari* issued, then state that the Judge dismissed the *certiorari*, and assign that dismissal as error without more. (R. See end of report.) *Ibid*.
3. A fact admitted in the bill of exceptions may be the basis of an affirmance of the judgment below, though that fact did not appear in the proceedings below. (R.) *Williams vs. Mandell*..... 26

4. If what purports to be a copy of the record is not certified by the Clerk the cause will be dismissed. (R.) *Palmer vs. Palmer*..... 575
5. If no part of the record is certified there can be no suggestion of a diminution of the record. (R.) *Ibid.*
6. If the bill of exceptions be not certified to be the true original, the cause will be dismissed. (R.) *Hutchens vs. Baker*..... 578
7. If the bill of exceptions be not certified to be the original by the Clerk, the writ of error will be dismissed, even though an answer of the Judge, with respect to the bill of exceptions, shows that it is the original. (R.) *Williams vs. Lowery*..... 587
8. Where a sheriff is ruled by a plaintiff in *fi. fa.*, and answers, to which answer a traverse is filed, and plaintiff, at a subsequent term, proposes to withdraw his traverse and substitute another, it is impossible for this Court to say that the Court below abused its discretion in allowing the sheriff a continuance, on the ground of such substitution, unless we had the new traverse before us. *Goode & Son vs Rawlins*.... 593
9. "It must *affirmatively* appear, either by the certificate of the presiding Judge or the transcript of the record sent up by the Clerk, that the bill of exceptions was signed and certified within thirty days after the close of the term in which the cause was heard," or the writ of error will be dismissed. (R.) *Newton vs. Burtz*.. 599
10. Where the bill of exceptions and the record are variant the latter governs. *Kitchens et al. vs. Hutchens* 620
11. Papers which are not properly a part of the record, though embodied in it, will not be considered by this Court. *Ibid.*
12. Under special circumstances, the Court waived copies of the bill of exceptions and briefs. (R.) *Thomas & Co. vs. Stokes*..... 631
13. A judgment of a Judge of the Superior Court overruling a demurrer to a bill is not a proper subject matter for the consideration of this Court in a bill of exceptions brought here under the provisions of the Act of October 29th, 1870. *Boone vs. Morgan*..... 634
14. Where a contract is for the payment of thirty-five bales of cotton, "the above mentioned cotton to be

- paid out of the cotton, to be paid by S. D. Bridgeman to the said Cochran, under written contract between them, bearing date 22d instant, and now in the hands of D. A. Cochran, and subject to the same liens and contingencies," it is impossible for this Court to construe the contract sued on, in the absence of that between Cochran and Bridgeman. *Cochran vs. Strong..* 636
15. The Court sat in May; the Clerk did not certify when it adjourned. The bill of exceptions was certified by the Judge on the 30th of June, and it stated that it was tendered to the Judge on the 26th of June, "within thirty days from the adjournment of the Court." The Court overruled a motion to dismiss said cause, because it did not affirmatively show that it was *certified* within thirty days from the adjournment of the Court. (R. See end of Report.) *Carhart vs. West et al.....* 657
16. There was no appearance for plaintiff in error. Aven's counsel moved to dismiss the writ of error because it was filed in the clerk's office one day too late, and the motion was granted. Before the order was made, it was suggested that the last day was a day of thanksgiving proclaimed by the President of the United States. The Court said then it was safer to have the case dismissed for want of prosecution. *Feagan vs. Aven.....* 661
17. Where numerous objections are filed to an award, on the ground that the award was the result of accident, or mistake, or fraud of some one or all of the arbitrators or parties, or is otherwise illegal, all of which objections are, in effect, objections because the award is contrary to evidence, or the weight of evidence, the testimony submitted to the arbitrators should be before this Court to enable it to pass intelligently upon the objections made. Nor will the fact that the objections were demurred to for insufficiency dispense with this. *Akridge et al. vs. Patillo.....* 585

See *Presumptions*.

PRESCRIPTION.

See *Ejectment*, 5, 8, 9, 11, 12, 14, 15, 16, 23, 24.

PRESUMPTIONS.

1. Where, upon the trial of an action of trespass *vi et armis*, the plea of the general issue was filed, and, after the case had been submitted to the jury, the Judge charged them that matters of justification could not be considered under the plea of not guilty filed, and the jury found for the plaintiff, and the bill of exceptions assigns error, upon the Judge's charge in the premises, but fails to set out the whole charge, or allege that the charge given was wrong:
Held, That this Court will presume the Court below charged the jury upon the law applied to the facts of the case, and not being excepted to that such charge was correct. *Kerwich vs. Steelman*..... 197
2. Where a party upon a motion to open a judgment under the Relief Act of 1868, which was dismissed by the Court, fails to bring up, in the record to this Court, the original record of the judgment moved to be opened:
Held, That, inasmuch as the party alleging error must show affirmatively the existence of the error complained of, this Court will presume, in the absence of the record of the judgment, everything in favor of the judgment, and of the dismissal of the motion.
Powell vs. Boring 169
3. The proper practice in preparing a motion for a new trial is, that all the rulings of the Court complained of during the trial, as well as the charges, and refusals to charge, of the Judge, shall appear distinctly in the motion, and be affirmatively recognized by the Court as true. But if such motion be made in writing, and notice thereof be given to the opposite party, and no rule *nisi* be granted, but it appear simply that the motion is argued and overruled, this Court will presume that the hearing was on a demurrer to the motion, in which the facts stated in the motion were admitted to be true. *Harrison vs. Hatcher*..... 638
4. When it was agreed that original deeds might be used in the argument of a motion for a new trial, and to the copy of the parol evidence various copy deeds were appended and sent up by the Clerk as part of the brief of the evidence, and the bill of exceptions contained no mention of such deeds, except that deeds, copies of

which are attached to the brief of evidence, were read in evidence, this Court refused to dismiss the cause, because said copies were not certified to be copies of said originals. The Court said they would presume that to be so. (R. See end of Report.) *Ibid.*

5. Every presumption will be made in favor of the constitutionality of an Act of a State Legislature. Where this Court has decided an Act of the Legislature constitutional, under which decision many private rights have been settled, and to disturb which might unsettle many others, and perhaps prove a great hardship to the plaintiffs in those cases already adjudicated, the doctrine of *stare decisis* applies. *Allison vs. Thomas et al* 649

PRINCIPAL AND AGENT.

1. Certain cotton receipts were given to Davidson, the testator, in his lifetime, by the defendant, subject to the demand of Davidson or his order, and on the back thereof was written, "Deliver to T. N. Johnson, or order. W. Davidson:"
Held, That this did not vest the title to the cotton in Johnson as against Davidson's legal representatives, but that it was competent to prove by Johnson that he was merely the agent of Davidson to receive the cotton and had no personal interest in it, and that the indorsement on the back of the receipt was made for that purpose only. *Lowery vs. Davidson et al.*..... 33
2. An agent for the collection of a note may not, without instructions so to do, receive any other than good currency in payment thereof. (R.) *Murray vs. Walker* 5
3. But if the agent received Confederate currency in payment of his principal's note, without authority, and his principal accepted the same from him:
Held, That the taking of the Confederate currency by the principal, and its use by him was a ratification of the act of his agent. *Ibid.*
4. The mere authority to raise money on the watch did not authorize the husband to consent to the sale, except in the ordinary mode, after due notice, as required by the statute. *Van Arsdale vs. Joiner*..... 173
5. Where Wise was the tenant of Irick, under an unexpired lease, and Irick wrote him about selling his

land, and stated in the letter that he would give him five per cent. to aid him to make sale, and Wise did acts equivalent to an acceptance of the proposition, by showing the land and giving notice it was for sale, and a man by the name of Crockett, with whom Wise had talked about selling the land, went to Virginia and bought from the owner, Irick, and when he returned, Wise made him pay \$500 00 for the surrender of the possession, and, upon the trial, the Court rejected this evidence:

Held, That this was error. If Wise claimed the commission upon the sale of five per cent., such sale contemplated the possession of the land to be given to the purchaser; and if he claimed the possession as against the purchaser, he could not fairly claim commission on the sale to him. And, upon the trial, we hold, if the jury found, from the evidence, that Wise did aid in the sale, and was entitled to commissions thereon, this evidence was admissible to show the payment of \$500 00, which should be deducted from the commissions, as, in that event, the presumption is, that Irick sold for less. If Wise was to be bought out of possession, he was not entitled to both compensations.

Irick vs. Wise..... 272

6. When certain foreign bills of exchange were drawn by the defendants, as the shipping agents and factors of the plaintiffs, payable to his order, though not signed by the defendants as agents, but drawn by them upon the grounds of the sale of the plaintiff's cotton as his agents, and under his instructions, according to the known and usual custom of the trade in such cases, and not on their own account, they not having received any valuable consideration therefor from the plaintiff, as the drawers of said bills, and the plaintiff having received the bills so drawn without objection, and, by his conduct, with full knowledge of the facts, having ratified the acts of the defendants, as his agents and factors, in selling his cotton and in drawing the bills so as to enable him to receive the proceeds thereof, according to the usage and custom of the trade:

Held, That, under the facts of this case, the defendants were not individually liable to the plaintiff as the drawers of the bills, but acted merely as his agents

- and factors in drawing the same, and on his account, and not on their own account. McCAY, Judge, dissenting. *Jones vs. Lathrop & Co.*..... 398
7. It is not necessary, under Revised Code, section 3898, that the consent of the mortgagor, mortgagee and plaintiff in *fi. fa.* levied, to sell the entire fee in the land levied on, should be in writing. It follows that where one, purporting to be the agent of the mortgagor, gives such consent, it is not necessary that the agency should be created in writing. *Goode & Son vs. Rawlins.*..... 593
8. A ratification of the act of such agent by the mortgagor, supposing the agent had no authority at the time of sale, is valid, under Revised Code, section 2165. *Ibid.*

See *Equity Jurisdiction*, 1.

PRINCIPAL AND SURETY.

Where upon a bill filed to enjoin the execution of certain *fi. fas.* obtained against A as principal, and B as surety, upon the ground that the owner of the *fi. fas.* had made a contract with A, by which he owed him an amount equal to the judgment, and which he paid him, to the wrong of his surety, by which the surety claimed to be discharged, and, upon the hearing, the holder of the *fi. fas.* by his answer showed that he was the owner thereof, and that during the war he had employed the principal defendant to carry off his negroes out of the reach of the Federal army, and had paid him therefor at the time in old issue of Confederate money, and that his family were destitute, and that there was no collusion, etc., and the Court, upon the bill and answer, refused an injunction:

Held, That this Court will not interfere with the discretion of the Judge below in refusing an injunction under the facts in this case, and that the employment and payment of the principal defendant as stated did not discharge the surety from liability on the judgment. *Hollingsworth vs. Tanner*, 11.

See *Pardons*, 4.

PROMISSORY NOTES AND BILLS.

1. Under the provisions of the Revised Code of this State, the indorsers of a bill or a note, not to be negotiated at a chartered bank, are not entitled to notice of non-payment, or non-acceptance, to charge them as indorsers: Code, 2739. In our judgment, there was no error in the decision of the Court below in overruling the motion for a new trial on either of the grounds stated in the bill of exceptions. *Gilbert & Vason vs. Seymour, Johnson & Co*..... 63
2. The question before the jury in this case was whether a certain debt had been transferred by the creditor to A, so as to defeat an offset against the creditor held by the debtor. It was in proof that the transfer, if made at all, was in payment of, or as collateral for, certain debts held by A against the creditor making the transfer, and that A had not given up the evidences of the debt, but retained them in his possession. The Judge charged the jury, in substance, that if they believed that there had been in fact a *bona fide* transfer made, then the transferee was protected against the offset, whether the transfer was in absolute payment or as collateral. *Tommey & Stewart vs. Ellis*..... 139
3. Where the payee of a note indorses it after maturity, and suit is brought by the indorsee against the makers and indorser, and the plea by the makers sets up usury, and the Judge held such plea by the makers did not affect the liability of the indorsers upon his contract of indorsement after maturity of the paper: *Held*, That this was not error. The contract of indorsement was a new and distinct contract, not affected by usury between the payee and makers in the hands of the indorsee without notice, and the indorser, in a suit against him by the indorsee, cannot set up his own illegal act in taking usury, to defeat a recovery against himself as indorser. *Frank et al. vs. Longstreet, Sedgwick & Co*..... 179
4. On a note made to be negotiated at a chartered bank, but not so negotiated and held by the payee at its maturity, and indorsed with a waiver of demand and notice by the security, and after its maturity indorsed by the payee, under our law, under 2739th section of Code, such indorser after maturity, upon suit by the

indorsee, is not discharged by failure of proof of "demand and notice," and it was not error in the Court to refuse a non-suit on this ground. *Ibid.*

5. In order to render verbal evidence of the contents of the notice to sue required by our law to be in writing and to contain certain facts, even when such notice is out of the jurisdiction of the Court, it is first necessary to give notice to the party or his attorney to produce it. *Ibid.*
6. When the evidence shows that the maker of a note borrowed \$2,400 from the payee, and gave three notes of \$1,136 each therefor, and paid two of the notes, and the payee indorsed the last note to a third party, in the hands of the third party, the note is only void to the amount of usury thereon, and it is not within the purview of the defense of the maker to such note, to set up usury paid upon the other notes to the holder and payee thereof. *Ibid.*
7. The evidence being that only \$800 00 was received upon the note due at twelve months for \$1,136 00 and \$721 82 was paid at maturity, the difference between \$800 00 and legal interest for one year, the lawful principal of the note and the payment, is the amount due, with interest, by the maker to the indorser; and we hold that the verdict is in excess of the amount due, under the evidence, and ought to have been for \$134 18, principal, with interest from 15th January, 1868, and direct that the verdict conform to this amount, else a new trial be granted to Jane Frank, the principal, and M. Frank, the security. *Ibid.*
8. When certain foreign bills of exchange were drawn by the defendants, as the shipping agents and factors of the plaintiff, payable to his order, though not signed by the defendants as agents, but drawn by them upon the grounds of the sale of the plaintiff's cotton as his agents, and under his instructions, according to the known and usual custom of the trade in such cases, and not on their own account, they not having received any valuable consideration therefor from the plaintiff, as the drawers of said bills, and the plaintiff having received the bills so drawn without objection, and, by his conduct, with full knowledge of the facts, having ratified the acts of the defendants, as his agents

and factors, in selling his cotton and in drawing the bills so as to enable him to receive the proceeds thereof, according to the usage and custom of the trade:

Held, That, under the facts of this case, the defendants were not individually liable to the plaintiff as the drawers of the bills, but acted merely as his agents and factors in drawing the same, and on his account, and not on their own account. *McCAY*, Judge, dissenting. *Jones vs. Lathrop & Co*..... 398

9. Where a note given for the purchase-money of land was traded after due, and suit instituted by the transferee upon such note went into judgment in 1867, and in 1869, the vendor of the land died, and his widow set up her claim to dower in the land, which was allowed her, upon the ground that the land came by inheritance through her, and she had not relinquished her right thereto, in terms of the law, and the vendor, the defendant to the suit upon the note, filed his bill in equity, praying an injunction and setting forth the facts, which was granted by the Court:

Held, The transferee of the note, after due, took it with the existing equities between the original parties, and the claim for dower, under the facts, was not such an equity as the defendant was bound to plead to the suit in 1867, as the right did not ripen until after the death of the vendor, in 1869, and that this Court will not interfere with the judgment of the Court below in granting an injunction restraining the collection of the judgment, at law, until the hearing under all the facts in this case. *Wright vs. McDonald*..... 452

10. Where a bill of exchange was accepted conditionally, if funds of the drawer come in hand, it is for the holder of the bill to show affirmatively that funds did come in hand, and the production of a stated account between the acceptor and drawer, showing a charge against the drawer of \$500 00 cash, does not, of itself, prove that the same was the funds of the drawer, there being nothing in the account to show that, at the time of this charge, the acceptor was indebted to the drawer, or had his funds in hand. *Marshall & Bro. vs. Clary* 511

11. A written contract for payment of specifics, not containing operative words of transfer, is assignable so as to vest the title in the assignee, who may sue on it in

his own name, under Revised Code, section 2218.

Cochran vs. Strong..... 636

12. A written assignment "for value received" indorsed on such an instrument, the instrument not being a promissory note or bill of exchange, does not make the assignor liable as indorser or guarantor of the instrument; hence he cannot be sued in the same action with the maker. *Ibid.*

13. Where such an instrument is assigned to A, who, in turn, assigns it to B, and, by some means, it again comes into the hands of A, he cannot sue on it in his own name for use of last assignee. *Ibid.*

14. A promise to pay a debt due by an applicant, to be declared a bankrupt, in consideration that the payee will withdraw his objections in the Bankrupt Court to the discharge of the bankrupt, is illegal and void, and no action can be sustained on such promise. *Austin vs. Markham*..... 161

PURCHASE-MONEY.

See *Homestead and Exemptions*, 10, 11.

QUO WARRANTO.

The Judge may refuse to allow a writ of *quo warranto* filed, unless it makes out a *prima facie* case in favor of the petitioner. (R.) *Stone vs. Wetmore*..... 495

See *Officers*.

REBELLION. See *War*.

RECONSTRUCTION ACTS. See *Officers*, 3, 4, 5.

RELIEF.

1. The resolution of the General Assembly prohibiting the levy of and sale under executions founded upon debts contracted prior to June, 1865, is not a good excuse for a sheriff who failed to collect the money on such execution. (R.) *Baker vs. Bower*..... 14

2. A plaintiff who resides out of the State is not required to pay taxes on his debt, under the provisions of the Act of 1870. *Williams vs. Mandell*..... 26

3. When a deed was made to Cherry at the time of the

sale of the land, and which he still holds, we are of opinion that, by the operation of law under such deed, he had the possession of the lands, either by himself or tenants, and the jury found against the evidence in finding the contrary, and the Judge erred in dismissing the case upon such verdict for non-payment of taxes under the Act of 1870. *Rawson vs. Cherry* ... 73

4. All motions under the Relief Acts to open judgment, must be confined to the legal equities authorized to be pleaded by said Act, and new matters of defense not embraced in the law are insufficient to predicate such motion upon. *Powell vs. Boring*..... 169

5. Upon the trial of a suit at common law, upon a note made before June, 1865, the defendant moved to dismiss it, on the ground that the plaintiff had not complied with the Act of October 13, 1870, which was overruled by the Court:

Held, That this was error, and, under the facts in this case, Akin being a transferee of the note, was not called upon to go further than show there was a compliance with the requirements of the Act of 1870, by having paid the legal tax due thereon, while he held the note, or have otherwise shown no tax was due, etc. WARNER, Judge, dissenting. *Cameron vs. Akin*..... 192

6. When the Court below rendered judgment upon a note made before June 1st, 1865, after overruling the motion to dismiss the suit for non-compliance with the Act of October, 1870, in relation to taxes:

Held, That the Court committed error. WARNER, Judge, dissenting. *Hilburn vs. Black*..... 194

7. Where a bill had been filed to marshal the assets of an estate, and under an interlocutory decree, the assets had been reduced to money, and were in the hands of a Receiver:

Held, That it was error in the Court to dismiss from the litigation such judgment creditors, parties to the proceeding, as held judgments founded on debts contracted before June 1, 1865, on the ground that said judgment creditors had not filed the affidavit that all legal taxes had been paid, as provided by the Act of October 13, 1870. *Neal vs. Patten et al* 227

8. The plaintiffs in the suit having resided out of the State at the making of the contract, and continuously

- since, there were no legal taxes due this State upon the same, and the affidavit was unnecessary that all legal taxes had been paid. *Carhart & Bro. vs. Parmore*.. 262
9. That portion of the Act of October 13th, 1870, which allows the claimant of land subject to an execution to set-off against the judgment the losses of the claimant, by the late war, is in violation of Article 1, section 10, paragraph 1, of the Constitution of the United States, and is, therefore, void. *Solomon vs. Lowery* 290
10. Where a suit was brought upon a bond for titles, alleging a breach since the 1st of June, 1865:
Held, That no affidavit of the payment of taxes, under the Act of October 13th, 1870, is required. *Pace vs. Wilkinson*..... 293
11. An affidavit, under the Act of 13th October, 1870, in a suit pending, that the plaintiff has paid all legal taxes on the debt, since he was the owner thereof, is a substantial compliance with the Act. *West vs. Sansom*..... 295
12. Though, under the Relief Act of 1870, plaintiff's affidavit need go no further than that all legal taxes on the claim from *him* have been paid, yet, if it appear, on the trial, that all taxes due thereon since its making were not paid, plaintiff cannot recover. (R.) *Ibid*.
13. Under the provisions of the Act of 1870, requiring taxes to be paid on all debts or contracts made prior to the 1st of June, 1865:
Held, That if the debt was not solvent, or of doubtful solvency, and the plaintiff makes an affidavit to that effect, it is sufficient to enable him to maintain his action in the Courts upon such debt or contract under the provisions of that Act. *Worrill vs. Adams et al*..... 347
14. An affidavit by an administrator, in a suit pending in his favor, on a debt contracted with his intestate before the first of June, 1865, that "according to the best of his knowledge and belief and information, all legal taxes have been paid on the same for each year since the same came into his possession as administrator, except for the years 1869 and 1870, deponent being advised that the note was so doubtful of collection that he was not required to pay taxes on the same for

the years 1869 and 1870, being then considered doubtful if not uncollectable," is a substantial compliance with the first section of the Act of October 13th, 1870.

Kelley vs. Carter..... 591

15. The fact that a widow and minors are interested as distributees, with other heirs and creditors of an estate, does not bring a suit on a note due an intestate and in suit by an administrator, within the 14th section of the Act of October 13th, 1870, so as to excuse the filing an affidavit and proof at the trial that all legal taxes due on the debt have been paid. *Ibid.*

16. If a levy be made of a *fi. fa.* founded on a debt contracted prior to June, 1865, and there be no affidavit of payment of taxes, as required by the fifth section of the Act of 1870, the defendant may stop the progress of the *fi. fa.* by affidavit of illegality. *Brown vs. Gill* 613

17. Upon a motion to dismiss a suit for the want of the affidavit required by the Relief Act of 1870, it is not error in the Court to hear and pass upon the evidence offered in support of the motion, especially where no objection is made at the time. *Brown vs. Broadfield.* 614

18. No allegations in the declaration, which, if true, would excuse the payment of taxes under the Relief Act of 1870, will dispense with the affidavit required by the Act, unless sworn to. *Ibid.*

19. When a defendant permitted judgment to be obtained against him after the passage of the Relief Act of 1868, he has had his day in Court, and cannot afterwards open the judgment to let in the defenses provided for by that Act. *Hiley vs. Hartridge*..... 623

20. When a levy was made prior to the Relief Act of 1870, but no sale has taken place, the plaintiff in *fi. fa.* is not obliged to attach his affidavit of the payment of taxes to the execution, under the fifth section of that Act, so long as he takes no steps to force a sale. *Ibid.*

21. Where, in a suit by two persons on a debt due before the first of June, 1865, the proper affidavit of payment of taxes was filed, and on the trial before the jury the interrogatories of one of the partners were read, to the effect that he had always regularly given in and paid taxes on his solvent notes, and that the note sued was solvent, and he had always includ-

ed it in his tax returns and paid taxes on it, as he believed, though he could not positively call to mind his giving in this particular note:

Held, That it was error in the Court to dismiss the case; there was sufficient evidence to carry the case to the jury, leaving them to determine whether or not the taxes had been duly paid, and whether or not the witness did not mean that he had, as one of the firm, given in this note and paid the taxes thereon. *Carhart & Curd vs. Bivins*..... 624

22. Where A buys land from B before June, 1865, and gives his note for the purchase-money, and afterwards sells the land and receives payment, and his purchaser takes possession, and A is then sued on the note, he cannot be said to have been, at the commencement of the action, in possession of the property for the purpose of which the contract was entered into, even though he may not have made to the purchaser a deed. The case is, therefore, not within the 15th section of the Relief Act of 1870, and the usual affidavit must be filed. *Irvin, administrator, vs. Speer*..... 626

23. Where a widow, as administratrix of her husband, sues on a note made prior to June 1st, 1865, and offers to prove that herself and her minor children are the sole heirs of her intestate, that there are no creditors, and that the entire assets of the estate are less than the amount exempt under the homestead laws, the case should not be dismissed for want of the tax affidavit, under the Relief Act of 1870. Had the proof been made, it would have brought the case within the 14th section of that Act. *Lewis, administrator, vs. Horne*..... 627

24. Where a tax-payer returns notes held by him in bulk, at what he considers them worth, and pays the taxes regularly on the gross amount so returned, it is sufficient compliance with the Act to carry the case to the jury. *Ibid.*

25. Where an accommodation indorser on a note made prior to June, 1865, has been compelled, by judgment, since that time, to pay the same or any part thereof, and sues the maker, securities and prior indorser, to recover the amount so paid by him, he is not obliged to file the affidavit of the payment of the taxes re-

- quired by the Relief Act of 1870. The debt to him did not exist until the payment of the judgment by him. *Ezzard vs. Worrill et al.*..... 629
26. It is necessary for an administrator to file the tax affidavit required by Act of 1870, even though there are no debts, and a widow and minor are interested with others in the estate. *Allison vs. Thomas, ex'r...* 649
27. Non-residents of this State are not required, by our law, to pay taxes on notes held by them on citizens of this State, and when the payee of a note is the plaintiff in a suit on a note dated before June, 1865, and it appear that, at the date of the note, and continuously since, he has not resided here, and that he has been the owner of the note from its date, he is not required to make the affidavit of taxes being paid as required by the Act of October 13th, 1870. *Cary, Bangs & Woodward vs. Edmondson*..... 651
28. The real plaintiff in the action may make the affidavit of payment of taxes, as required by the Act of 1870, even though the suit be brought in the name of another. *Carhart vs. West et al.*..... 657
- See *Constitutional Law*, 1, 11, 13, 14, 15, 17, 22.
- “ *Removal of Causes to United States Courts.*

REMOVAL OF CAUSES TO UNITED STATES COURTS.

Upon the call of a case upon the docket, the counsel for the plaintiff stated to the Court that he had a motion prepared to transfer the case to the United States Court, and the Court refused to hear the motion, giving precedence to a motion to dismiss the case upon the ground of non-payment of taxes, under the Act of 1870. This was error. *Bragg et al. vs. Tibbs....* 294

RES ADJUDICATA.

1. When a defendant has had his day in Court, he cannot, by an affidavit of illegality, go behind the judgment and attack it on the ground that the consideration of the debt, on which the judgment was rendered, was the purchase-money due for slaves. *Inman vs. Jones* 44
2. Where it appears, from the statement of the facts set

out in the motion, that the defense to the original suit involved the same issues now involved and presented by the motion, this Court will not set aside the judgment of dismissal. *Powell vs. Boring*..... 109

3. When there was a *certiorari* from the County Court, which, under the Act of 1866, Code, 297, is to be heard by the Judge of the Superior Court, in vacation or in term, as should to him seem proper, and there was tendered to the Judge, in vacation, a traverse of the answer of the County Court Judge, and the Judge of the Superior Court thereupon, by written order, directed the papers and the traverse to be transmitted to the next term of the Superior Court for trial:

Held, That this was a judgment of the Judge that the traverse should be tried by the jury, and that, while that judgment stands unreversed, it is error to dismiss the traverse and withdraw the case from the jury on the ground that the traverse was not verified by the affidavit of the party making it. *Mundy vs. Martin*. 195

4. The rule that the judgment of a Court of competent jurisdiction is conclusive between the parties, as to the matter in issue, does not apply to a judgment against a trustee, as such, if the object of the suit be to charge the trust property with a debt for which the trustee is only personally liable, unless it appear that the *cestui que trust* is *sui juris*, and was a party to the suit, or consented to the judgment; and equity will interfere to enjoin such a judgment, if it appear that, in fact, the trust-estate was not liable for the debt sued on.

Meyer vs. Butt & Bro. et al.... 468

5. When a defendant permitted judgment to be obtained against him after the passage of the Relief Act of 1868, he has had his day in Court, and cannot afterwards open the judgment to let in the defenses provided for by that Act. *Hiley vs. Hartridge*..... 623

6. Parties who appear before the Ordinary to contest the granting of a homestead are concluded by the judgment upon all questions which it is necessary for the applicant to prove, and upon all questions which the statute provides the creditors may make, but they are not concluded upon questions over which the Ordinary has no jurisdiction, unless it appears that they actually made such questions, and that they were, in fact, decided. *Harris vs. Colquitt & Baggs*..... 663

7. It is error for the Court below to refuse to charge the jury when requested, in writing, in the language of the judgment of this Court, on the same statement of facts in a case between the same parties, which had previously been adjudicated in this Court. *Pugh vs. McCarty*..... 383

RESCISSION OF CONTRACT.

See *Equity Jurisdiction*, 7.

ROADS.

When a bill was filed, praying for an injunction to restrain the defendant from obstructing a road over his own land, and the complainants did not show that they had the legal right to use the road over the defendant's land, as a private way, or that the road had ever been established by the proper authority as a public road, or that it had been worked or recognized by the public authorities of the county as a public road, so as to give the complainants a prescriptive right to use it as such over the defendant's land :

Held, That the injunction was properly refused. *Clements vs. Logan*..... 30

SABBATH DAY.

1. The Christian Sabbath is a civil institution older than our government, and respected as a day of rest by our Constitution ; and the regulation of its observance as a civil institution is within the power of the Legislature, as much as any regulations and laws having for their object the preservation of good morals, and the peace and good order of society : 33 Barbour, 543 ; 1 Speers, 305. And it is within the right of the city of Atlanta to punish keeping open doors by dealers generally, in the limits of the city, upon Sunday, for the purpose of *preventing* the violation of the State laws, as well as preserving the public respect for the Lord's day. *Kerwich vs. M. and C. of Atlanta*..... 205
2. When a contract for labor was entered into on the Sabbath, and the contract was performed afterwards by the laborer :
Held, That the promissor cannot defend by setting forth the illegality of the contract. *Meriwether vs. Smith*.. 543

SAYINGS OF PARTNERS. See *Partnership*, 4.

SAYINGS OF PARTY. See *Ejectment*, 20.

SCALING ORDINANCE.

1. The right to open the settlement is made by agreement to turn upon the settlement by the Courts of a rule that Confederate contracts are to be scaled on the basis of the rate of Confederate money at the maturity of the contract:

Held, That, before the plaintiff could recover in this case, it was incumbent on him to show that the Court had settled the rule to be as the contract provided, and, as there is no evidence to this effect, a new trial ought to have been granted. *The Milledgeville Manufacturing Co. vs. Rives* 479

2. When there was a settlement, in 1867, of a contract made in 1862, payable in Confederate currency, the basis of which settlement was the value of Confederate money at the date of the contract, which the debtor then paid in cotton, taken at thirty cents per pound, when cotton was, in fact, selling at twenty-six cents, and the parties agreed, in writing, that if the Courts should settle the basis to be that the true basis of settlement was the value of Confederate money at the maturity of the contract, they would modify their settlement accordingly. The right to open the settlement is made by agreement to turn upon the settlement by the Courts of a rule that Confederate contracts are to be scaled on the basis of the rate of Confederate money at the maturity of the contract. *Ibid*.

SEIZIN. See *Distribution of Estates*, 3.

SERVICE. See *Judgments*.

SET-OFF.

That portion of the Act of October 13th, 1870, which allows the claimant of land subject to an execution to set-off against the judgment the losses of the claimant by the late war, is in violation of Article 1, section 10, paragraph 1, of the Constitution of the United States, and is, therefore, void. *Solomon vs. Lowery*.. 290

SEVERANCE.

MCCAY, Judge, being brother-in-law of one of the executors, who was propounding the will in controversy, would not preside. Counsel for propounders moved to strike that executor's name from the record. Two Judges presiding said he could not do so. He then moved to sever as to plaintiffs in error, and then to decline to litigate as to that executor, citing 6 Georgia Reports, 210; 10th, 1, etc. This was refused. *Dupree's executors vs. Dupree*..... 301

SHERIFFS.

1. When a sheriff was notified in writing that an execution placed in his hands was founded on a debt which was for the purchase-money of land claimed as a homestead, and, having failed to make the money, was ruled for the amount of the execution:
Held, That the sheriff was liable to be ruled for the value of the land he was notified to levy on and sell, that being the extent of the injury which the plaintiff sustained by the failure of the sheriff to perform his legal duty; and that the rule should have been made absolute against him for that amount and not for the amount due on the execution, if that exceeds the value of the land. *Baker vs. Bower*..... 14
2. When land is sold under a mortgage *fi. fa.* the sheriff cannot put the purchaser in possession by ousting one who is neither the defendant, his tenant, or assignee, or heir, and who holds adversely to the mortgage. *Donkle vs. Kohn*..... 266
3. Where a judgment was obtained in Schley county, on the 25th of October, 1870, on a debt contracted before the first of June, 1865, upon which an execution issued, and the sheriff failed to raise the money on the same, on receiving from the defendant an affidavit that the taxes due thereon had not been paid, together with a claim of an offset and recoupment, in favor of the defendant, according to the Act of October 13th, 1870, which affidavit set forth that said debt had not been reduced according to the equities between the parties, under the Relief Act of 1868:
Held, It was error in the Court to hold the sheriff liable, on a rule for the amount of the judgment—the proper construction of the Act of October 13th, 1870, being:

at the time, unsettled and doubtful, and the sheriff having apparently acted in good faith. *Meyers vs. Wilcox*..... 336

4. Where the sheriff, in answer to a rule calling upon him to show cause why he had not made the money on a *fi. fa.* issued by the Comptroller General against a defaulting tax collector, showed, for cause, that the defendant had no property on which to levy the *fi. fa.*, and in a traverse of the return, it appeared that the defendant was in possession of a tract of land which had been set apart as a homestead for the benefit of his wife and family:

Held, That there was no error in the Court in refusing, under the circumstances, to make this rule absolute, as the sheriff appears to have acted in good faith, and the property was real estate. WARNER, J., dissenting. *The State vs. Bradford, sheriff*..... 417

5. Sheriffs, though out of office, are liable to rule, under the provisions of the Code. *Bell et al. vs. Thorpe*... 509

6. A sheriff is not entitled to costs on tax *fi. fas.*, whether for State or county taxes, unless the same be collected from the defendants. Nor does the fact that the *fi. fas.* issued illegally, under order of the Inferior Court, alter the rule. *Keen vs. Rouse*..... 601

SHERIFF'S SALES.

1. It is not necessary, under Revised Code, section 3898, that the consent of the mortgagor, mortgagee and plaintiff in *fi. fa.*, levied, to sell the entire fee in the land levied on, should be in writing. *Goode & Son vs. Rawlins*..... 593
2. If a sheriff undertakes to sell the fee in land, when, in fact, he is selling only the equity of redemption, the bidder cannot be compelled to pay the amount bid by him. (R.) *Ibid.*

SLANDER.

1. The Court was asked to charge that, if the plaintiff's cotton was seized by the Treasury agents in consequence of defendant's affidavit, and that said affidavit was untrue, he then was liable for plaintiff's damage; and that the measure of the damages was the value of the cotton, with additional damages as a punishment,

if the proof showed malice on the part of the defendant. This charge the Court refused, and charged that, if the defendant acted in good faith, and made the affidavit on proper demand by the United States officials, honestly believing he was stating the truth, after proper caution and prudence on his part as to his means of information, he was not liable at all, even though he was mistaken in the statement that the loan had not been paid:

- Held*, That there was no material error in the charge, and the jury having found under the charge for the defendant, it was not error in the Court to refuse a new trial. *Reid vs. McLendon*..... 156
2. It is not error for the Court to charge the jury that the words as alleged in the declaration are libellous, as that is not an expression of opinion as to the evidence before the jury. *Pugh vs. McCarty*..... 383
3. To render words actionable *per se*, it is not necessary that they should, in express words, charge another with a crime punishable by law; it is sufficient, if they impute a crime, in such terms as that the hearers understand that this is what is meant. *Lewis vs. Hudson*..... 568
4. When the words themselves are actionable, as imputing a crime, an *innuendo*, indicating in plainer language what crime was meant, is unnecessary, and may be rejected as surplusage. *Ibid*.

SLAVE DEBTS. See *Novation*.

SPECIFIC PERFORMANCE.

See *Equity Jurisdiction*, 11.

STALENESS. See *Equity Practice*, 1.

STAMPS.

An agreement by counsel that a certain paper, described in the agreement, should be used as evidence, removes all objections to the proof, and to the stamping of the writing. *The Milledgeville Manufacturing Co. vs. Rives*..... 479

STAY LAWS. See *Relief*, 1.

STIPULATED DAMAGES.

See *Measure of Damages*, 3, 9.

STREETS.

See *Municipal Corporations*, 2 to 3, inclusive.

SURPRISE. See *New Trial*, 20.

TAXATION.

1. The Act of October 28th, 1870, directing the Ordinaries of the several counties to assess a tax to pay the salaries of the District Judges and attorneys, is sufficiently definite, since, from the census of 1870, the amount due from each county may be ascertained by simple calculation, and the tax books in the Comptroller General's office will furnish the property to be taxed. WARNER, Judge, dissenting. *Taylor vs. Gormly* 76
2. The Augusta Factory, an incorporated company, is only liable, under the existing laws of this State, to pay a tax on the whole amount of the capital stock of the company paid in, and not on the market value thereof:
Held, That the Augusta Factory Company is liable for the payment of all legal taxes on the property owned by it as a corporation which is not included as a part of their capital stock and constitutes no part thereof. McCAY, Judge, dissenting. *Wilson et al. vs. The Augusta Factory*..... 388
3. It was the duty of the Court to have directed the sheriff, by order, to levy upon the property, that the parties may have an opportunity of testing, before the Courts, whether the homestead so set apart, is or is not subject to an execution by the Comptroller General against a defaulting tax collector. WARNER, Judge, dissenting. *The State vs. Bradford*... 417
4. Non-residents of this State are not required, by our law, to pay taxes on notes held by them on citizens of this State. *Cury, Bangs & Woodward vs. Edmondson*. 649

TAX COLLECTORS.

See *Homestead and Exemptions*, 9.

TAX PAYERS. See *Equity Jurisdiction*, 6.

TRESPASS VI ET ARMIS.

It was error in the Court to have charged the jury that they could not consider the fact of justification under the plea of the general issue. By the Code, section 3406, and the rulings of this Court in 9 Georgia Reports, 297, and 12 Georgia Reports, 463, such facts of justification must have been specially pleaded. *Kerwisch vs. Steelman*..... 197

TRUSTEES. See *Ejectment*, 22.

TRUST DEBTS. See *Distribution of Estates*, 2

VACANCY.

See *Officers*, 6.

“ *Constitutional Law*, 2.

VERDICTS.

1. Under our Code juries may find equitable verdicts, and the verdict against Guild, the indorser, upon the note sued, should stand affirmed. *Frank et al. vs. Longstreet, Sedgwick & Co*..... 179
2. If plaintiff is adjudged a bankrupt after suit brought, the Court may direct the jury if they find for plaintiff, to find that he recover for the use of his assignee in bankruptcy. (R.) *Woddail vs. Austin & Holliday*. 18

VOLUNTEERS. See *Ejectment*, 19.

WAIVER.

1. When a *certiorari* has been sanctioned, but no notice, in writing, has been given to the opposite party of the same ten days before the term to which the *certiorari* is returnable; but it is, in writing, agreed between the parties that the decision of the Court upon the points made in the *certiorari* shall determine certain other cases suing on the same points, this is substantially a waiver of the notice and an agreement that the *certiorari* shall be decided upon its merits. *Scott, Bonduant & Adams vs. Patrick*..... 188
2. When objections were filed to certain interrogatories,

- as leading, and the Judge certifies that, upon his announcement that, if the objections were sustained, he would continue the case, the party making the objections ceased to urge them, this Court will not, for that reason, grant a new trial. *Pool vs. Perdue*..... 454
3. Objections to the form of the affidavit in an attachment are waived by the appearance of the defendant, and pleading to the merits. *Ibid.*
4. Where an attachment had been issued against A, and at the trial term it was agreed that B should be substituted for A, and the cause proceed against him :
Held, That this was a dissolution of the attachment, and the cause stood upon the footing of an ordinary suit against B, with service waived. *The Milledgeville Manufacturing Co. vs. Rives*..... 479

WAR.

1. Title by capture during the war can only be set up by the organized and recognized parties to the war, or by those claiming and acquiring title from said organized and recognized parties. *Worthy vs. Kinamon et al.*..... 297
2. Where it appeared, from the record, that A. brought an action of trover to recover a wagon, which belonged to the Confederate States at the time of the surrender of General Joseph E. Johnston, and subsequent to such surrender, was given to the brother of A., who was at work for the Confederate States authorities at Augusta, by the Confederate States Quartermaster, who gave it to A., and after such giving to A., he took it from the depot at Waynesboro, where it was, and ran it off into the swamp, where B.'s negroes found it, and B. had it brought to his house and repaired, etc., and, afterwards, hearing that A. claimed the wagon, B. reported it to the United States authorities, who gave B. the possession and the use thereof; and, upon the trial, the Court rejected the written evidence of this possession by the Federal official in command of the District of Georgia, and charged the jury, "that the receipt of the wagon by Attaway from a Confederate Quartermaster in settlement of his wages was a valid payment, and conferred a complete title, although the same was made after such surrender,"

and refused to charge as requested by defendant's counsel as to the effect of the surrender, as to property, etc., and the jury found for the plaintiff, and a motion made for a new trial, upon the several grounds, was overruled by the Court:

Held, That the Court erred in its view of the law of this case. The defendant had a right to the evidence rejected, for the written permission of the authorities of the United States touching property captured or surrendered to it by the Confederate States authorities, was admissible, and proper evidence for the consideration of the jury. *Byrne vs. Attaway* 302

3. The territory over which General Johnston had command, and which was covered by the surrender to General Sherman, being a part of the public history of the country, it was the duty of the Court to take cognizance of it without any proof of the fact, and the terms of this transaction being within the territory so embraced by the surrender, all property controlled by each military organization commanded by General Johnston was surrendered by him; and the Confederate States Quartermaster had no power, and could confer no title to the same by any act of his; and the surrender, without actual manual possession of the property surrendered by the United States authorities, conferred to them the title or right of possession to such property surrendered, and their disposition of such property was competent by such military orders as that government may have ordered, and admissible in evidence to show the fact, and are conclusive against any one claiming by Confederate States title, when such orders have been procured without fraud, and are properly proved. *Ibid*.

See *Officers*, 3, 4, 5.

WIDOWS.

See *Distribution of Estates*.

“ *Dower*.

“ *Relief*, 15, 23, 26.

WORDS. See *Slander*.

“ *By two Judges*.” See *Note*, page 567.

YEAR'S SUPPORT.

See *Distribution of Estates*, 5.

SAYINGS OF PARTNERS. See *Partnership*, 4.

SAYINGS OF PARTY. See *Ejectment*, 20.

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1. The right to open the settlement is made by agreement to turn upon the settlement by the Courts of a rule that Confederate contracts are to be scaled on the basis of the rate of Confederate money at the maturity of the contract:
Held, That, before the plaintiff could recover in this case, it was incumbent on him to show that the Court had settled the rule to be as the contract provided, and, as there is no evidence to this effect, a new trial ought to have been granted. *The Milledgeville Manufacturing Co. vs. Rives* 479
2. When there was a settlement, in 1867, of a contract made in 1862, payable in Confederate currency, the basis of which settlement was the value of Confederate money at the date of the contract, which the debtor then paid in cotton, taken at thirty cents per pound, when cotton was, in fact, selling at twenty-six cents, and the parties agreed, in writing, that if the Courts should settle the basis to be that the true basis of settlement was the value of Confederate money at the maturity of the contract, they would modify their settlement accordingly. The right to open the settlement is made by agreement to turn upon the settlement by the Courts of a rule that Confederate contracts are to be scaled on the basis of the rate of Confederate money at the maturity of the contract. *Ibid.*

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That portion of the Act of October 13th, 1870, which allows the claimant of land subject to an execution to set-off against the judgment the losses of the claimant by the late war, is in violation of Article 1, section 10, paragraph 1, of the Constitution of the United States, and is, therefore, void. *Solomon vs. Lowery*.. 290

SEVERANCE.

JAY, Judge, being brother-in-law of one of the ex-
 cutors, who was propounding the will in controversy,
 could not preside. Counsel for propounders moved
 to strike that executor's name from the record. Two
 judges presiding said he could not do so. He then
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pre's executors vs. Dupree..... 301

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 tion placed in his hands was founded on a debt which
 was for the purchase-money of land claimed as a home-
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Id., That the sheriff was liable to be ruled for the value
 of the land he was notified to levy on and sell, that
 being the extent of the injury which the plaintiff sus-
 tained by the failure of the sheriff to perform his legal
 duty; and that the rule should have been made abso-
 lute against him for that amount and not for the
 amount due on the execution, if that exceeds the value
 of the land. *Baker vs. Bower*..... 14

When land is sold under a mortgage *fi. fa.* the sher-
 iff cannot put the purchaser in possession by ousting
 one who is neither the defendant, his tenant, or as-
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 gage. *Donkle vs. Kohn*..... 266

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 the 25th of October, 1870, on a debt contracted before
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Id., It was error in the Court to hold the sheriff liable,
 on a rule for the amount of the judgment—the proper
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- at the time, unsettled and doubtful, and the sheriff having apparently acted in good faith. *Meyers vs. Wilcox*..... 336
4. Where the sheriff, in answer to a rule calling upon him to show cause why he had not made the money on a *fi. fa.* issued by the Comptroller General against a defaulting tax collector, showed, for cause, that the defendant had no property on which to levy the *fi. fa.*, and in a traverse of the return, it appeared that the defendant was in possession of a tract of land which had been set apart as a homestead for the benefit of his wife and family:
Held, That there was no error in the Court in refusing, under the circumstances, to make this rule absolute, as the sheriff appears to have acted in good faith, and the property was real estate. WARNER, J., dissenting. *The State vs. Bradford, sheriff*..... 417
5. Sheriffs, though out of office, are liable to rule, under the provisions of the Code. *Bell et al. vs. Thorpe*... 509
6. A sheriff is not entitled to costs on tax *fi. fas.*, whether for State or county taxes, unless the same be collected from the defendants. Nor does the fact that the *fi. fas.* issued illegally, under order of the Inferior Court, alter the rule. *Keen vs. Rouse*..... 601

SHERIFF'S SALES.

1. It is not necessary, under Revised Code, section 3898, that the consent of the mortgagor, mortgagee and plaintiff in *fi. fa.*, levied, to sell the entire fee in the land levied on, should be in writing. *Goode & Son vs. Rawlins*..... 593
2. If a sheriff undertakes to sell the fee in land, when, in fact, he is selling only the equity of redemption, the bidder cannot be compelled to pay the amount bid by him. (R.) *Ibid.*

SLANDER.

1. The Court was asked to charge that, if the plaintiff's cotton was seized by the Treasury agents in consequence of defendant's affidavit, and that said affidavit was untrue, he then was liable for plaintiff's damage; and that the measure of the damages was the value of the cotton, with additional damages as a punishment,

if the proof showed malice on the part of the defendant. This charge the Court refused, and charged that, if the defendant acted in good faith, and made the affidavit on proper demand by the United States officials, honestly believing he was stating the truth, after proper caution and prudence on his part as to his means of information, he was not liable at all, even though he was mistaken in the statement that the loan had not been paid:

Held, That there was no material error in the charge, and the jury having found under the charge for the defendant, it was not error in the Court to refuse a new trial. *Reid vs. McLendon*..... 156

It is not error for the Court to charge the jury that the words as alleged in the declaration are libellous, as that is not an expression of opinion as to the evidence before the jury. *Pugh vs. McCarty*..... 383

To render words actionable *per se*, it is not necessary that they should, in express words, charge another with a crime punishable by law; it is sufficient, if they impute a crime, in such terms as that the hearers understand that this is what is meant. *Lewis vs. Hudson*..... 568

When the words themselves are actionable, as imputing a crime, an *innuendo*, indicating in plainer language what crime was meant, is unnecessary, and may be rejected as surplusage. *Ibid*.

SLAVE DEBTS. See *Novation*.

SPECIFIC PERFORMANCE.

See *Equity Jurisdiction*, 11.

STALENESS. See *Equity Practice*, 1.

STAMPS.

An agreement by counsel that a certain paper, described in the agreement, should be used as evidence, removes all objections to the proof, and to the stamping of the writing. *The Milledgeville Manufacturing Co. vs. Rives*..... 479

STAY LAWS. See *Relief*, 1.

STIPULATED DAMAGES.

See *Measure of Damages*, 3, 9.

STREETS.

See *Municipal Corporations*, 2 to 8, inclusive.

SURPRISE. See *New Trial*, 20.

TAXATION.

1. The Act of October 28th, 1870, directing the Ordinaries of the several counties to assess a tax to pay the salaries of the District Judges and attorneys, is sufficiently definite, since, from the census of 1870, the amount due from each county may be ascertained by simple calculation, and the tax books in the Comptroller General's office will furnish the property to be taxed. WARNER, Judge, dissenting. *Taylor vs. Gormly* 76
2. The Augusta Factory, an incorporated company, is only liable, under the existing laws of this State, to pay a tax on the whole amount of the capital stock of the company paid in, and not on the market value thereof:
Held, That the Augusta Factory Company is liable for the payment of all legal taxes on the property owned by it as a corporation which is not included as a part of their capital stock and constitutes no part thereof. McCAY, Judge, dissenting. *Wilson et al. vs. The Augusta Factory*..... 388
3. It was the duty of the Court to have directed the sheriff, by order, to levy upon the property, that the parties may have an opportunity of testing, before the Courts, whether the homestead so set apart, is or is not subject to an execution by the Comptroller General against a defaulting tax collector. WARNER, Judge, dissenting. *The State vs. Bradford*..... 417
4. Non-residents of this State are not required, by our law, to pay taxes on notes held by them on citizens of this State. *Cary, Bangs & Woodward vs. Edmondson*. 649

TAX COLLECTORS.

See *Homestead and Exemptions*, 9.

TAX PAYERS. See *Equity Jurisdiction*, 6.

TRESPASS VI ET ARMIS.

It was error in the Court to have charged the jury that they could not consider the fact of justification under the plea of the general issue. By the Code, section 3406, and the rulings of this Court in 9 Georgia Reports, 297, and 12 Georgia Reports, 463, such facts of justification must have been specially pleaded. *Kerwisch vs. Steelman*..... 197

TRUSTEES. See *Ejectment*, 22.

TRUST DEBTS. See *Distribution of Estates*, 2

VACANCY.

See *Officers*, 6.

“ *Constitutional Law*, 2.

VERDICTS.

. Under our Code juries may find equitable verdicts, and the verdict against Guild, the indorser, upon the note sued, should stand affirmed. *Frank et al. vs. Longstreet, Sedgwick & Co*..... 179

. If plaintiff is adjudged a bankrupt after suit brought, the Court may direct the jury if they find for plaintiff, to find that he recover for the use of his assignee in bankruptcy. (R.) *Woddail vs. Austin & Holliday*. 18

VOLUNTEERS. See *Ejectment*, 19.

WAIVER.

. When a *certiorari* has been sanctioned, but no notice, in writing, has been given to the opposite party of the same ten days before the term to which the *certiorari* is returnable; but it is, in writing, agreed between the parties that the decision of the Court upon the points made in the *certiorari* shall determine certain other cases suing on the same points, this is substantially a waiver of the notice and an agreement that the *certiorari* shall be decided upon its merits. *Scott, Bonduant & Adams vs. Patrick*..... 188

When objections were filed to certain interrogatories,

- as leading, and the Judge certifies that, upon his announcement that, if the objections were sustained, he would continue the case, the party making the objections ceased to urge them, this Court will not, for that reason, grant a new trial. *Pool vs. Perdue*..... 454
3. Objections to the form of the affidavit in an attachment are waived by the appearance of the defendant, and pleading to the merits. *Ibid.*
4. Where an attachment had been issued against A, and at the trial term it was agreed that B should be substituted for A, and the cause proceed against him :
Held, That this was a dissolution of the attachment, and the cause stood upon the footing of an ordinary suit against B, with service waived. *The Milledgeville Manufacturing Co. vs. Rives*..... 479

WAR.

1. Title by capture during the war can only be set up by the organized and recognized parties to the war, or by those claiming and acquiring title from said organized and recognized parties. *Worthy vs. Kinamon et al.*..... 297
2. Where it appeared, from the record, that A. brought an action of trover to recover a wagon, which belonged to the Confederate States at the time of the surrender of General Joseph E. Johnston, and subsequent to such surrender, was given to the brother of A., who was at work for the Confederate States Quartermaster, who gave it to A., and after such giving to A., he took it from the depot at Waynesboro, where it was, and ran it off into the swamp, where B.'s negroes found it, and B. had it brought to his house and repaired, etc., and, afterwards, hearing that A. claimed the wagon, B. reported it to the United States authorities, who gave B. the possession and the use thereof; and, upon the trial, the Court rejected the written evidence of this possession by the Federal official in command of the District of Georgia, and charged the jury, "that the receipt of the wagon by Attaway from a Confederate Quartermaster in settlement of his wages was a valid payment, and conferred a complete title, although the same was made after such surrender,"

and refused to charge as requested by defendant's counsel as to the effect of the surrender, as to property, etc., and the jury found for the plaintiff, and a motion made for a new trial, upon the several grounds, was overruled by the Court:

Feld, That the Court erred in its view of the law of this case. The defendant had a right to the evidence rejected, for the written permission of the authorities of the United States touching property captured or surrendered to it by the Confederate States authorities, was admissible, and proper evidence for the consideration of the jury. *Byrne vs. Attaway* 302

The territory over which General Johnston had command, and which was covered by the surrender to General Sherman, being a part of the public history of the country, it was the duty of the Court to take cognizance of it without any proof of the fact, and the terms of this transaction being within the territory so embraced by the surrender, all property controlled by each military organization commanded by General Johnston was surrendered by him; and the Confederate States Quartermaster had no power, and could confer no title to the same by any act of his; and the surrender, without actual manual possession of the property surrendered by the United States authorities, conferred to them the title or right of possession to such property surrendered, and their disposition of such property was competent by such military orders as that government may have ordered, and admissible in evidence to show the fact, and are conclusive against any one claiming by Confederate States title, when such orders have been procured without fraud, and are properly proved. *Ibid*.

Officers, 3, 4, 5.

WIDOWS.

Distribution of Estates.

Dower.

Relief, 15, 23, 26.

WORDS. See *Slander*.

By two Judges." See *Note*, page 567.

YEAR'S SUPPORT.

Distribution of Estates, 5.

